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Freedom, Law, and the Republic

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Abstract

This thesis considers the question of human freedom through the lens of the revival of republican political theory that has taken place in recent decades. In its first part, it distinguishes between different strands of that revival and argues that one of these presents a variant of human freedom which more adequately captures the human condition than does the ideal of freedom traditionally endorsed by liberal thought. It then considers that question of freedom in relation to very fundamental questions of power, law, and the reasons for which we accept the existence of an organised public power in the first place, arguing that the individual finds himself trapped between, on one hand, threats to his freedom which are horizontal, emanating from private parties, and those which are vertical, arising from the apparatus of public power which exists in order to protect man from man. In part two, one of the principal advantages identified for the neo-republican ideal - its aptness for application to the freedom of individuals in relation to each other, as well as in relation to the state - is explored within the specific contexts of the relationship of husband to wife and that of employer to employee. In each case, the relationship between the question of freedom and the specific legal rules which determine when and where public power will intervene against or on behalf of one party in relation to another, most generally the rules of private property, is analysed. It is argued that freedom is primarily a function of the 'ordinary' law: that which determines one's rights and duties in relation to others, and which determines the distribution of property through taxation and spending. On the basis of this account, a renewed republican constitutionalism which focuses upon issues of property within the constitution - as a right protected by fundamental rights documents, and as a potentially distorting factor within the democratic process - is offered in part three. The normative element of republican constitutionalism is not exhausted by the issue of how to organise the organs of the state such that the individual is not dominated by the state: issues of private right being a function of constitutional processes, the constitution must also ensure that its outputs do not force man to live at the mercy of man.

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It has long since become clear to me that whatever merit I might have as a person I owe entirely to my mother and my father, and for that I thank them.

I declare that, except where explicit reference is made to the contribution of others, this dissertation is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution

Paul Scott

“It is sufficiently understood, that the opinion of right to property is of moment in all matters of government. A noted author has made property the foundation of all government; and most of our political writers seem inclined to follow him in that particular. This is carrying the matter too far; but still it must be owned, that the opinion of right to property has a great influence in this subject.”

David Hume, *Of the First Principles of Government*

“The limits of political emancipation are evident at once from the fact that the state can free itself from a restriction without man being really free from this restriction, that the state can be a free state without man being a free man.”

Karl Marx, *On the Jewish Question*

“The omnipresence of power: not because it has the privilege of consolidating everything under its invincible unity, but because it is produced from one moment to the next, at every point, or rather in every relation from one point to another. Power is everywhere; not because it embraces everything, but because it comes from everywhere.”

Michel Foucault, *The History of Sexuality: Volume 1*

Introduction - The dual failure of republican constitutionalism

The history of the modern state is a history of expanding functions. Where once the principal functions of the political unit were those of preserving internal peace and securing its citizens and their property against external threats, over time the state has assumed far greater role. The regulation of commerce, the provision of health care and education and the partial redistribution of wealth are now commonly undertaken by western liberal democracies, and new or renewing states have often signalled an intention of assuming an even broader role in protecting the welfare of their citizens. What was once optional tends now towards necessity: the exceptional becomes the new normal. The power of the state is great and in many ways still growing, exercised via a unique coercive apparatus and legitimated by a democratic mandate. The state has time and again demonstrated a willingness to abuse both of these assets. Once justified as protector and benefactor, its history shows it to have been as likely to destroy and tyrannise.

These abuses of power have not been without consequence and in recent years, the trajectory of expansion has encountered resistance. The effects of a global financial crash have dovetailed with a still-thriving neo-liberalism and a renewed libertarian trend in politics to mean that in much of the world we see the role of the state, already under attack throughout the 1980s and 90s, being scaled back. On this basis, the place of the regulatory state of the post-war world is no longer secure, while the end of the era of full employment places the welfare state under tremendous strain. The proceeds of economic growth find their way into the hands of a small sliver of society, a privileged few who have come to resent the cost of securing the welfare of the disenfranchised many. The distribution of wealth in the major capitalist economies becomes ever more unequal. Gains fought for over many generations are undone by the stroke of a pen. The state's role in the distribution of wealth and the provision of services is increasingly threatened, forced to justify itself ever more frequently against those who would dismantle it. All the while the state's destructive capacity is, on the basis of transient and ill-defined threats, maintained, honed, and exercised with alarming frequency. The shrinking of the state is an asymmetric project.

Against this background, a new political republicanism offers the possibility of erecting intellectual defences against the twin threats of totalitarianism on one hand and neo-

liberalism and libertarianism on the other; promise of succeeding where liberal-legalism has largely failed. The reconceptualisation of the idea of freedom as involving not that one not be interfered with, but that one not be subject to the arbitrary interference of another, makes a vital contribution to understanding what sort of life we can and should desire within a progressive political framework. In particular, the neo-republican revival reveals the precariousness of human existence, sandwiched as the individual is between dual threats to his freedom: that posed by those with whom he shares the world and, on the other hand, that which derives from those institutional structures put in place to protect him from those other persons, but which themselves harbour the potential to repeat the totalitarian excesses of the mid-20th century. Republican freedom is a dualist freedom.

The neo-republican project has thus far failed to fulfil its potential. Its failure is two-fold. The first is perhaps best understood as a failure of imagination. Where neo-republicans have brought their conceptual apparatus to bear upon legal questions, they have too often claimed for their project the identity of a friendly companion to, rather than rival of, those traditions based upon a conception of freedom which republicanism rejects. The neo-republican ideal is therefore translated into an assessment of constitutional practice which finds the status quo largely satisfactory, quibbling only with its theoretical underpinning. Republican constitutionalism is too often liberal constitutionalism in a different guise. While this continues to be true, the energy which drives it is wasted.

This failure is consequent on a more basic but more important misstep. The neo-republican project has neglected the duality from which it begins and which should ground all that follows; it has maintained the liberal focus upon threats to freedom which emanate from the state and left largely untheorised those which are horizontal - an important consideration in the past, and one which re-emerges hand in hand with the rolling back of the state. While the threats posed by the state are more obvious and more extreme than are those posed to man by his fellow man, the latter are more widespread; where liberalism focuses on (un)freedom at the margins, exceptional and intermittent, neo-republicanism must consider that which is normalised within the legal system, constituted by (and therefore amenable to dismantling by) the 'ordinary' private law. An account which accepts this as part of the project of freedom returns the freedom-promoting capacity of the state to centre-stage and suggests that it is worth defending against the neo-liberal and libertarian desire to dismantle it *in the name of*

freedom. It shows why and how the aim of political freedom common to liberal and republican constitutionalism should be augmented by a concern for a fuller, human, freedom in whose light that constitutional project must be understood.¹

The thesis proceeds in the following stages. Chapter 1 explains what I understand to be the claims of neo-republicanism and the reasons for their attractiveness. It considers how the movement relates to republicanism as a historical phenomenon, and what it offers as a normative ideal which is not present in dominant strands of liberal and libertarian thought: a vision of freedom which takes public and private equally seriously as potential sources of unfreedom. It emphasises the relational nature of neo-republican freedom, distinct from the methodological individualism of liberalism, but also from communitarian approaches which assume the existence of a distinct and unitary public interest whose promotion is required for the achievement of freedom. It argues that the liberal ideal of freedom as non-interference is undesirable in that it is reduced to absurdity by the necessity of shared human existence.

Chapter 2 introduces law to the picture, arguing against claims that law necessarily reduces freedom and demonstrating how the relationship between law and freedom varies with the concept of freedom from which one begins. Neo-republican freedom implies the rejection of both the state of nature metaphor as a paradigm of freedom and the absolutism which Hobbes accepts in trading liberty for security. Reconceived in republican terms, the move from the state of nature into the presence of an unbounded sovereign merely exchanges horizontal for vertical unfreedom. The republican ideal, which deprecates both forms of unfreedom, situates itself between these extremes. It justifies the very existence of an organised public power - the state - and makes it necessary to explain how that power must relate to law if freedom is not to be infringed at the formal level: the answer offered involves appropriating the rule of law ideal, which itself protects the individual from the arbitrary exercise of power.

Chapter 3 considers two forms of horizontal unfreedom which not only exist in the presence of public power but which, like the relationship of slavery which republicanism takes as its antithesis, are contingent upon it: that based on gender and that on economic factors. In each case, historical manifestations of the relevant form of horizontal unfreedom are reconsidered

¹ References to an opposition between human and political emancipation are influenced, beyond the obvious, by the use of the latter term in Alex Gourevitch, *Labor and Republican Liberty*, (2011) 18 Constellations 431, at 442.

for lessons applicable to the current project. Each acts as a guide to the existence and location of horizontal domination in contemporary society. Chapter 4 returns to fundamentals, revisiting prominent liberal accounts as to the relationship between, firstly, specific distributions of wealth and freedom and, secondly, freedom and private property itself. The neo-republican account benefits from the fact that liberal positions on these questions collapse into incoherence: the non-interference ideal cannot justify the real-world existence and distribution of private property.

Two case studies are offered in chapters 5 and 6, based upon the historical manifestations of horizontal domination flagged up in chapter 3. The former considers the relationship between husband and wife and the manner in which changes in law which have occurred over time have largely undone the historical ability of husbands to domineer over their wives. Chapter 6 does the same in the context of employer and employee, showing how legal rules determine whether an employee is obliged to live at the mercy of his employer. Here, we return to the picture our account of property: where the law of divorce permits a radical discontinuity in the property background against which husband and wife relate, that of employer and employee leaves that background largely intact. To the extent that the background in question is constituted by the state and its laws, however, it is right that the law be used so as to recalibrate the relationship between employer and employee, such that no relationship of domination exists between them. This requires the amendment of the circumstances under which and the identities of the parties on whose behalf public power is willing to intervene. Its defence of property having put in place the conditions for horizontal domination, the conditions of deployment of the state's coercive apparatus must be calibrated to rebalance private relationships.

Our third part considers the implications of horizontal domination for republican constitutionalism. Chapter 7 examines the use to which constitutional thinkers have put the neo-republican ideal. Two themes are identified: a hesitant relationship with democracy, and ambivalence as to the role of rights review of legislation. It suggests that each derives from a unthinking inheritance of the liberal presupposition that the most likely relationship of domination is vertical, when in fact unfreedom is as likely to be horizontal. Neo-republican constitutionalism cannot be satisfied with rules and practices which render free in relation to the state, but must demand those which foster horizontal freedom.

Chapters 8 and 9 proceed on this basis. The first analyses the right to property as a rights whose protections is as likely to impede the spread of freedom as promote it. The second is thematically linked, considering the potential of money to subvert the democratic process: where republican thought is concerned to establish its own relationship with democracy, we can instead assume that its democratic credentials are secure and look at a specific example of how the democracy can be improved, in order that the new end identified for the republican constitution - that of fostering horizontal freedom - is satisfied.

One theme of this project is the extent of the interrelation between law and freedom, and the counter-intuitive location of the most important nodes of interaction. Human freedom is as likely to be impacted by quotidian principles of judicial review and family law as it is by the grand constitutional questions which have colonised the discourse of freedom in modern times. Alongside this, the elucidation of the complex interaction between public and private - both threatening freedom but each manipulable by and to a considerable degree underpinned by the other - provides us with a second conclusion: that we must be alert to the possibility of a feedback loop, whereby private power 'captures' public power and uses it for its own magnification, which in turn makes it easier for the process to repeat itself in future. This process has characterised the distribution of power in the United Kingdom and the United States in the years of neo-liberal pre-eminence, and has been both 'legitimated' and obscured by a rhetoric of freedom which owes much to the liberal conception of freedom against which republican thought situates itself. It suggests how we might begin to redress the imbalances of contemporary freedom by taking seriously both public and private power, remaining sensitive to their interaction in constituting the situations of unfreedom we encounter all around us in the modern world. In all of this, the initial, fateful recognition of private property conditions all that follows. Where public power sustains property, we are required to intervene elsewhere to prevent this willingness from founding horizontal relationships of domination.

This thesis is a work in constitutional theory which displays a greater concern than is normal amongst constitutional theorists for what we might call 'ordinary' law. The discussion of abstract ideas and concepts is intertwined with a concern for their consequences in the field of an actually existing legal and constitutional order. This reflects a deeply held belief that

constitutional theory, if it is to be worth doing, must say something about real constitutions; their strengths and their weaknesses; how they work and how they should work; what they do and what they should do. Its argument can be summed up in the twin propositions that the average individual's primary experience of freedom and unfreedom is horizontal in nature and contingent upon the ordinary law of private right and obligation, and that the optimal organisation of a polity's constitution can be identified only in light of this fact.

Part 1 - Chapter 1: Republicanism and Neo-republicanism

1.1 Republicanism

This chapter examines the literature on republicanism, both as historical phenomenon and in the form of the neo-republican project centred on the ideal of non-domination. It aims to commandeer it in order to steer a path between visions of law and politics which leave the individual exposed to the dominating potential of the state on one hand and, on the other, those which, determined to protect the individual from the state, lay her bare to forms of economic and social domination which only the state can hope to prevent. The ideal of non-domination requires us to focus attention in the first place on the most dominated, yet neo-republicanism has failed to do so. Those who have been and continue to be unfree in our society - the poor, certain minorities, women - are potentially the greatest beneficiaries of a switch from a liberal to a republican consciousness, but risk being neglected as a consequence of republicanism's unquestioning assumption of certain key liberal presuppositions. I aim to maintain these groups as my focus, and so stay true to the underlying logic of the neo-republican project.

1.1.1 Belated clarity

Only since the publication of Phillip Pettit's 'Republicanism: A Theory of Freedom and Government' in 1999, has 'republicanism' taken on a settled meaning, and even then only in a specific context. Prior to this, republicanism was an exceptionally vague term.¹ The links between republicanism as a political theory, the republic as a political system,² and the *res publica*³ more generally, creak with the strain that the passage of time has placed upon them. The already-difficult question of what thinkers such as Aristotle, Arendt, Harrington, Milton

¹ Hence John Adams' observation that "There is not a single more unintelligible word in the English language than republicanism," quoted in Linda K. Kerber, *The Republican Ideology of the Revolutionary Generation*, (1985) 37 *American Quarterly* 474. The observation originates in a letter to the playwright Mercy Otis Warren, known as the "Conscience of the American Revolution."

² Consider the very different senses in which 'republican' is used in the (non-justiciable) clause in Article Four of the U.S. Constitution which requires the United States to "guarantee to every State in this Union a Republican Form of Government" (meaning a form of representative democracy) and in modern debates in the United Kingdom and Australia as to the possibility of replacing the Monarch with a non-hereditary head of state. On the latter, see, e.g., Wayne Hudson and David Carter (eds.), *The Republicanism Debate*, New South Wales University Press (1993), outlining a debate which led to a 1999 referendum. The proposal, to replace the Queen with a President elected by two-third majorities of a joint session of Parliament, was rejected.

³ Literally, the 'public thing' or the 'republic': traditionally translated into English as the 'commonwealth'.

and Machiavelli have in common is further complicated by the entry into the equation of Skinner, Pettit and those who follow. Though Pettit's ideal of non-domination has in a sense usurped older manifestations of republicanism, properly understood it encompasses many of their concerns, though in a manner which both avoids the vagueness of older republican thought: it permits the articulation of old ideas in terms better suited to the critique of modern political orthodoxy. Its analytical tools are ripe for instrumentalisation in a manner which those of its predecessors were often not. To see why we must contextualise it within the broader tradition.

1.2 Dichotomies of freedom: ancient and modern

Within modern political-legal theory, republicanism defines itself principally in opposition to liberalism, from which it is distinguished by the answer it gives to the question of what it means for an individual to be free. Answers to this are dominated by two seminal discussions: on one hand we have Benjamin Constant's distinction between the 'liberty of the ancients' and the 'liberty of the moderns' and, on the other, Isaiah Berlin's division of freedom into its 'positive' and 'negative' variants.⁴ Consideration of each illuminates the distinctive nature of the eventual republican alternative.

In modern times,⁵ Constant told us, freedom is understood to encompass a variety of rights, including:

“the right to be subjected only to the laws, and to be neither arrested, detained, put to death or maltreated in any way by the arbitrary will of one or more individuals. It is the right of everyone to express their opinion, choose a profession and practise it, to dispose of property, and even to abuse it; to come and go without permission, and without having to account for their motives or undertakings.”⁶

⁴ Isaiah Berlin, *Two Concepts of Liberty*, in *Liberty*, Oxford University Press (2002); Benjamin Constant, *The Liberty of the Ancients Compared with that of the Moderns*, in Biancamaria Fontana (ed.) *Constant: Political Writings*, Cambridge University Press (1988).

⁵ Modernity is relative - Constant delivered his lecture to the Aténée Royale in 1819.

⁶ Constant, note 4, at 310-11. Constant's was not the first attempt at unravelling these issues: Four others - Jean Lousie de Lolme, Joseph Priestly, Geramine de Staël and Jean Charles Simonde de Sismondi - had considered

These various instantiations of modern liberty are linked by their individual focus, marking off areas of life in which to interfere with a person is to render her unfree. Interference with certain rights is a breach of freedom per se (so that, for example, *any* attempt to stop a person choosing a profession is incompatible with his freedom) whereas the limitations put in place by the criminal justice system are similarly incompatible only if exercised, not according to law, but at the mere will of some other persons. This distinction between mere interference and interference which is arbitrary or capricious will later prove vital to the case for republican freedom.

In contrast to the individualism of ‘modern’ liberty, that of ‘the ancients’ “consisted in exercising collectively, but directly, several parts of the complete sovereignty; in deliberating, in the public square, over war and peace... in examining the accounts, the acts, the stewardship of the magistrates; in calling them to appear in front of the assembled people, in accusing, condemning or absolving them.”⁷ The ancients (Constant refers to Sparta and Rome, noting that Athens was the most ‘modern’ of ancient republics) did not consider it possible to exercise freedom individually, for freedom comprised the communal exercise of powers belonging to the people as a whole. This was more than mere solidarity: the “complete subjection of the individual to the authority of the community” was compatible with this ‘ancient’ freedom.⁸ The individual enjoyed no rights or freedoms qua individual and was at the mercy of the collective action of his peers.

1.2.1 Exercise and opportunity concepts

What Constant describes does not include mere unconsummated potential. In modern times, one’s freedom to dispose of one’s property includes the possibility of not doing so: the actual disposal is irrelevant to freedom. ‘Ancient’ freedom, however, holds the fact of having the option to deliberate matters of state insufficient. One is free only insofar as one participates.⁹

the contrast between ancient and modern liberty. See Guy Howard Dodge, *Benjamin Constant's Philosophy of Liberalism*, University of North Carolina Press (1980), at 43-5.

⁷ Constant, note 4, at 311.

⁸ Constant, note 4, at 311.

⁹ The obvious modern reference point is Rousseau, in particular his insistence that freedom is achieved through participation in a process of collective self-determination. Constant acknowledges this, but regards Rousseau’s insistence on ancient liberty in a very different context to be a deadly error: “[B]y transposing into our modern

The distinction is between ‘exercise-concepts’ and ‘opportunity-concepts’ of freedom¹⁰ - does one have to act in a certain way in order to be free? If so, we have an ‘exercise’ concept. If not, if freedom is understood merely in terms of how one might potentially act, separately from whether or not one acts at all, then it is an ‘opportunity-concept’ and “being free is a matter of what we can do, of what it is open to us to do, whether or not we do anything to exercise these options.”¹¹

This distinction matters, for the assumption that the ‘liberty of the ancients’ can only sensibly be considered an exercise-concept - that if being free means acting in consort with one’s fellow man, a failure to act renders unfree - has seen it subjected to damaging criticism. Not all of its cognates are so conceived: Hannah Arendt follows Aristotle in emphasising the centrality of the interactive dimension of human existence, but nevertheless prizes the possibility of *not* participating:

“Not everyone wants to or has to concern himself with public affairs. In this fashion a self-selective process is possible that would draw together a true political elite in a country. Anyone who is not interested in public affairs will simply have to be satisfied with their being decided without him. But each person must be given the opportunity.”¹²

With this simple amendment, the liberty of the ancients shows itself capable of accommodating the individual autonomy which Constant’s view might be considered to deny, without immediately lapsing into the sort of selfish individualism encouraged by perspectives which make room *only* for the individual, and which consequently deprecate the phenomenon of collective social enterprise.

age an extent of social power, of collective sovereignty, which belonged to other centuries, this sublime genius, animated by the purest love of liberty, has nevertheless furnished deadly pretexts for more than one kind of tyranny.” Constant, note 4, at 318.

¹⁰ Charles Taylor, *What’s Wrong With Negative Liberty*, in Alan Ryan (ed.), *The Idea of Freedom*, Oxford University Press (1979), at 213.

¹¹ Taylor, note 10, at 213.

¹² Hannah Arendt, *Thoughts on Politics and Revolution*, in her *Crises of the Republic*, Harcourt (1972), at 233. See also Hannah Arendt, *On Revolution*, Penguin (1990), at 279-80.

1.2.2 The triumph of modern liberty

For Constant, the triumph of modern liberty was based on practicality rather than principle, resulting from the changed nature of the modern state as compared to the ancient city-states. The increased size of the political unit “causes a corresponding decrease of the political importance allotted to each individual” - he sees his opportunities to contribute and the relative weight of his contributions diminished while the abolition of slavery means that there is no longer a free population which enjoys “the leisure which resulted from the fact that slaves took care of most of the work.”¹³ That the political units of the past often required the systematic exclusion of certain groups in order to function effectively is a recurring theme in discussions of freedom, to which those arguing for the superiority of some past model of communal life must be alert. Constant addresses it only as a practical issue. Similarly, the problem of what we might call the ‘large republic’ does not alter the essence of freedom, but provides a pragmatic, non-exclusionary, reason for preferring a variant better suited to modern existence.¹⁴ The change is therefore amenable to reversal if pragmatic considerations once again render preferable collective action over individualism.

1.2.3 Commerce and freedom

The size of the political unit was not the decisive factor. More importantly, modern society is organised around commerce rather than warfare and the former, unlike the latter, does not “leave in men's lives intervals of inactivity.” Instead, it “inspires in men a vivid love of individual independence and “supplies their needs, satisfies their desires, without the intervention of the authorities.”¹⁵ In a commercial society, the intervention of the state is not merely futile - it is always, Constant assures us unconvincingly, “a trouble and an embarrassment.”¹⁶ The growth of commerce has usurped many of the functions of the state and in doing so contributed to the individualisation of liberty. No longer is active political

¹³ Constant, note 4, at 314.

¹⁴ For divergent opinions on the relative virtues of large and small republics, see Montesquieu, *The Spirit of the Laws*, in Anne M. Cohler, Basia Carolyn Miller and Harold Samuel Stone (eds.) *Montesquieu: The Spirit of the Laws*, Cambridge University Press (1989), at 124, and 131-2 and James Madison, *Federalist no. 10*, in James Madison, Alexander Hamilton and John Jay, *The Federalist Papers*, Penguin (1987). Madison rejects Montesquieu's conclusion as to the impossibility of a large republic on the basis of a distinction between a (direct) democracy and a republic (which is indirectly democratic) (at 126-7).

¹⁵ Constant, note 4, at 315.

¹⁶ Constant, note 4, at 315.

association a necessary condition of human freedom. This theme has a particular resonance in the history of republican thought, and attempts to understand and control the changes taking place in society as a result of the growth of commerce form an important part of the modern republican project.¹⁷ While only tenuously republican, much of the work associated with the Scottish Enlightenment speaks to this question.¹⁸ Constant's observations are questionable - does commerce really teach men to love independence, or merely to love money and to believe that where the state does not interfere, profit is more likely? - yet in its generality, his claim that commerce is less compatible, if not quite incompatible, with old ideas and practices of political participation contains a kernel of self-evident truth.¹⁹

Its replacement is not without cost: the danger of modern liberty is that "absorbed in the enjoyment of our private independence, and in the pursuit of our particular interests, we should surrender our right to share in political power too easily."²⁰ Compared to more profitable activities, the pursuit of political power may have lost some of its allure, but its importance remains. The solution to the problems associated with each variant, Constant advises, is to learn the lessons of freedom both ancient and modern, and "combine the two together," mixing public and private in a way which allows for the enjoyment of private liberty yet nurtures a desire to discharge public functions.²¹ Ancient liberty and modern liberty; public activity and private activity - in neither case does one alone suffice. Notwithstanding the damage they can do to a well-rounded view of human freedom, it seems the attractions of commerce were not as easily resisted as Constant hoped. Or, rather, that

¹⁷ E.g., J.G.A. Pocock, *Virtue and Commerce in the Eighteenth Century*, (1972) 3 *The Journal of Interdisciplinary History* 119. The essay is a review of two contributions to a strand of American historiography which had shown that "the Revolution employed - and in some measure was occasioned by - an oppositional ideology that had been nurtured in British politics for nearly a century" which "belonged to a tradition of classical republicanism and civic humanism" (at 119-20). This ideology, like the liberty of the ancients, was argued to have been rendered obsolete by commerce.

¹⁸ See, for example, chapters 3 and 4 of book 4 of John Millar's *An Historical View of English Government*, discussed in Adam Tomkins, *On Republican Constitutionalism in the Age of Commerce: Reflections from the Scottish Enlightenment*, in Samantha Besson and José Luis Martí (eds.), *Legal Republicanism: National and International Perspectives*, Oxford University Press (2009).

¹⁹ See also Polanyi: "Neither freedom nor peace could be institutionalized under [19th century market economy], since its purpose was to create purpose and welfare, not peace and freedom," and so the death of the market economy could see "regulation and control" used to "achieve not only freedom for the few, but for all." Karl Polanyi. *The Great Transformation*, (2nd ed.) Beacon Press (2001), at 255-6. This is part of a narrative which rejects the claim to spontaneity made on behalf of liberal laissez-faire as a method of economic organisation: "laissez-faire was planned" (at 141).

²⁰ Constant, note 4, at 326.

²¹ Constant, note 4, at 328.

they have been resisted only to the extent that political activity is the handmaiden of commerce; that control of political power potentially facilitates private profit.

1.3 Dichotomies of freedom: positive and negative

Berlin's "Two Concepts of Liberty,"²² presents itself as an attempt at clarifying a concept which threatens to descend into meaninglessness, 'liberty' being a "term whose meaning is so porous that there is little interpretation it seems able to resist."²³ Berlin defines the 'positive' and 'negative' variants in terms of the question to which each provides an answer.²⁴ Negative liberty tells us "[w]hat is the area within which the subject - a person or group of persons - is or should be left to do or be what he is able to do or be, without interference by other persons?"²⁵ while positive liberty helps to ascertain "[w]hat, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?"²⁶ As defined here the variants are not mutually exclusive: one might be negatively free insofar as not interfered with in a certain metaphorical space, yet also positively free in that space because responsible for his own choices and actions. It is therefore a mistake to believe that one must choose one variant to the exclusion of the other, and yet Berlin's essay has given rise to an unnecessary dichotomy, according to which one can either be positively free or negatively free, but never both. Better, perhaps, to regard the relationship as one of priority: one *can* enjoy freedom in both forms simultaneously, but one of the two is more desirable than the other.

1.3.1 Negative liberty

Negative liberty is achieved through the *absence* of interference. It is:

²² Berlin, note 4.

²³ Berlin, note 4, at 168.

²⁴ Neither variant is monolithic; rather, they are 'families' of conceptions, which vary in their details. In this metaphor, Berlin's articulations are merely the *patres familias*, albeit rather domineering ones. See Taylor, note 10, at 211.

²⁵ Berlin, note 4, at 169.

²⁶ Berlin, note 4, at 169.

“the area within which a man can act unobstructed by others. If I am prevented by others from doing what I could otherwise do, I am to that degree unfree.”²⁷

Freedom is the absence of interference; unfreedom its presence. Between exercise and opportunity concepts, Berlin’s negative freedom is the latter, in that the absence of obstacles to a specific course of action is decisive, rather than the question of whether or not it is pursued. We noted that in Constant’s ‘modern’ liberty, one can identify a distinction between limitations which reduce freedom per se, and those which reduce freedom only when implemented or enforced on an arbitrary basis. No such distinction is made here: whether sensible and reasoned, or vindictive and capricious, any rule or action which prevents a man from doing what he desires reduces his freedom. This is a stark definition, and its inflexibility has poisoned the legacy of negative liberty, for it renders impossible ‘freedom’ in the sense described. Such practical impossibility would seem a large price to pay, even for the alluring simplicity of Berlin’s negative liberty.

1.3.2 Positive liberty

Positive liberty relates to the human desire for autonomy - to make choices for oneself, and not have one’s actions determined by outside forces:

“I wish, above all, to be conscious of myself as a thinking, willing, active being, bearing responsibility for my choices and able to explain them by reference to my own ideas and purposes. I feel free to the degree that I believe this to be true and enslaved to the degree that I am made to realise that it is not.”²⁸

This is partly analogous to the self-government of the ancients, in that it concerns the source of rules and controls, but is distinct in the same way that the freedom of the ancients is distinct from that of the moderns: namely, the freedom of the ancients considers that rules will be set collectively, while modern liberty shares with positive liberty an individual focus. The imperative for mere autonomy, not further qualified, might conceivably be satisfied by

²⁷ Berlin, note 4, at 169.

²⁸ Berlin, note 4, at 178.

collective self-control (as in the democratic city-states which Constant associates with ancient freedom), but if the imperative is to be satisfied at the individual level, collective self-government is not the solution: it may be a lesser form of autonomy from the point of view of the individual in that it calls for compromise and sacrifice that may not be acceptable where his own interests are paramount. It is also, simultaneously and paradoxically, a more-demanding standard: it implies not merely positive liberty for me, but also for those with whom I share that autonomy. It therefore suggests that I have as much reason to want others to have a self-directed life as I do myself. This implication is absent in Berlin's positive liberty, the individualism of which distances it significantly in practical terms from the freedom of the ancients. Where Constant's notion of what freedom meant to 'the ancients' is defined such that one must participate in order to be free, Berlin's positive freedom makes no such demand - the individual can be positively free without doing anything. There is no requirement that subjective feelings of autonomy are objectively justifiable: a naïve or plain wrong assessment of the degree to which one is positively free would seem irrelevant to the status of that freedom. A government might satisfy its requirement not by leaving its citizens the possibility of controlling their own lives, but merely by repeatedly informing them that they do so.

1.3.3 The triumph of negative liberty

Berlin is not blind to this fact, and puts it at the centre of his rejection of positive liberty. He notes in particular the abuse carried out by totalitarian States and those others who substitute "the individual with his actual wishes, and needs" for "the 'real' man within, identified with the pursuit of some ideal purpose not dreamed of by his empirical self,"²⁹ - swapping subjective autonomy for some supposedly objective autonomy alien to the individual. He therefore rejects notions of the greater good, the general will or the inevitable march of history.³⁰ Negative liberty - unable to collude in the false teleology of its positive variant - is identified as more suitable for the modern world, the value pluralism which it promotes rendering it a "truer and more human ideal."³¹ This endorsement has contributed to the process whereby negative liberty has come to be seen as the 'true' version, lending its

²⁹ Berlin, note 4, at 181.

³⁰ For a general critique of which, focusing on Plato, Hegel and Marx and, like Berlin, linking historicism with tyranny, see generally Karl Popper, *The Open Society and Its Enemies*, Routledge (2011).

³¹ Berlin, note 4, at 216.

simplicity and rhetorical vigour to large swathes of the political landscape. Freedom begins where interference ends.

1.3.4 The politics of negative liberty

As Berlin notes, however, negative liberty works only to prevent actual interference with the individual's interests. It is entirely compatible with a situation where a party has the opportunity to interfere but for some contingent reason does not. The slave with a benevolent master is as free as any man. Nor is any distinction made between liberty which is secure - where interference is impossible or highly unlikely - and that which is precarious, liable to wax and wane with the whims of the powerful, towards whom the weak must therefore act with a certain obsequiousness. Both aspects suggest that such a reductive concept of liberty lacks the normative 'bite' that would allow progressive critique of situations where complex power networks exist, yet for contingent reasons do not give rise to tangible interference. Negative freedom may allow for multiple and incompatible values to subsist, but beyond that openness to pluralism, we begin to see why its achievement may not be of decisive value.

Equally, Berlin happily admits that "Liberty in this sense is not incompatible with some kinds of autocracy, or at any rate with the absence of self-government," being "principally concerned with the area of control, not with its source."³² By endorsing negative liberty over its positive variant rather than some combination of the two - which would not necessarily be logically problematic - Berlin writes the democratic imperative out of his account. Self-government may have an instrumental value in that it "may, on the whole, provide a better guarantee of the preservation of civil liberties than other regimes" but "there is no necessary connection between individual liberty and democratic rule."³³ Although the weaknesses of understanding freedom in this way are several, and its lessons for the reality we inhabit dubious, "most [liberals] unite in endorsing the modernist conception of liberty."³⁴ The long

³² Berlin, note 4, at 176.

³³ Berlin, note 4, at 177. Hayek agrees: "...it is possible for a dictator to govern in a liberal way. And it is also possible for a democracy to govern with a total lack of liberalism. Personally I prefer a liberal dictator to democratic government lacking liberalism." Interview with *El Mercurio* newspaper (12 April 1981), quoted in Eric Aarons, *Hayek Versus Marx: And Today's Challenges*, Routledge (2009), at 223.

³⁴ Philip Pettit, *Republicanism: A Theory of Freedom and Government*, Oxford University Press (1997), at 50. Waldron instead suggests that rejection of aspects of positive freedom is more important to liberal thought than is the endorsement of the negative variant. In particular, the idea of individual identity as constituted by social order is deeply problematic, for "it seems to rule out the possibility of an individual standing back from that

shadow cast over positive liberty by totalitarianism, as well as the underlying individualist bent of modern liberalism, has ensured the triumph of the only alternative Berlin considers. Where Constant took the middle ground, attempting to preserve what was good in both traditions, modern debate is often characterised by this conceptual absolutism.

1.3.5 Theorists of liberal freedom

The variants Berlin describes are in certain ways caricatures of positions to which few subscribe. Notwithstanding the impression he gives, positive liberty,

“has no necessary connection with the view that freedom consists *purely and simply* in the collective control over the common life, or that there is no freedom worth the name outside a context of collective control”³⁵

Analyses which reject it on these grounds are therefore overly hasty, but such a characterisation nonetheless retains a utility as an ‘ideal type’ among a family of positive conceptions. On the other hand, however, the “corresponding caricatural version of negative liberty” has found influential adherents.³⁶ “Liberty, or freedom,” Hobbes insists, “signifieth properly the absence of opposition (by opposition, I mean external impediments of motion)... For whatsoever is so tied, or environed, as it cannot move but within a certain space, which space is determined by the opposition of some external body, we say it hath not liberty to go further.”³⁷ The emphasis on the external nature of those impediments is important, for “when the impediment of motion is in the constitution of the thing itself, we use not to say it wants the liberty, but the power, to move; as when a stone lieth still, or a man is fastened to his bed by sickness.”³⁸ Neither fear nor necessity vitiates freedom and thus a man who throws his goods overboard to save his ship and his life does so both willingly and freely, in Hobbes’

form of social order and subjecting it to critical evaluation.” Jeremy Waldron, *Theoretical Foundations of Liberalism*, (1987) 37 *The Philosophical Quarterly* 127, at 132.

³⁵ Taylor, note 10, at 212.

³⁶ Taylor, note 10, at 212.

³⁷ Thomas Hobbes, *Leviathan*, in Richard Tuck (ed.) *Hobbes: Leviathan*, Cambridge University Press (2nd Edition) (1996), at 145. Pettit has recently suggested that the distance Berlin places between himself and Hobbes should have pushed him away from freedom as non-interference altogether, it being an ‘unstable alternative’ being freedom as non-frustration and freedom as non-domination: Philip Pettit, *The Instability of Freedom as Noninterference: The Case of Isaiah Berlin*, (2011) 121 *Ethics* 693.

³⁸ Hobbes, note 37, at 146.

telling.³⁹ Though this exclusion of internal factors “rules out of court one of the most powerful motives behind the modern defence of freedom as individual independence, viz., the post-Romantic idea that each person’s form of self-realization is original to him/her, and can therefore only be worked out independently,”⁴⁰ it avoids the problem of having to rank motives - to distinguish between a subject’s ‘true’ desires, and those which distract from or frustrate those desires.⁴¹ It is this unwillingness to venture into the ranking of motives, Charles Taylor has suggested, which leads political philosophers to stick to the ‘Maginot line’ of strict negative liberty, even at the risk of neglecting self-realisation as a human ideal.⁴² Negative liberty need not necessarily be as stark as Hobbes painted it, but such starkness is preferred, for the gains made in sacrificing it are outweighed by the complications introduced.⁴³

Bentham also endorses a definition of liberty that the caricaturist would struggle to better:

“Liberty... is neither more nor less than the absence of coercion. This is the genuine, original and proper sense of the word liberty. The idea of it is an idea purely negative. It is not anything that is produced by positive Law. It exists without Law, and not by means of Law.”⁴⁴

The language of coercion here replaces Hobbes’ focus on opposition (and will itself later be sidelined by ‘obstruction’ in Berlin).⁴⁵ Whatever the phenomenon in question, its

³⁹ Hobbes, note 37, at 146.

⁴⁰ Taylor, note 10, at 212.

⁴¹ The ranking of one’s own motives entails a distinction between what men want, and what they want to want. Harry Frankfurt claims that the ability to have such second-order desires are a defining feature of human beings: men “are capable of wanting to be different, in their preferences and purposes, from what they are. Many animals appear to have the capacity for what I shall call ‘first-order desires’ or ‘desires of the first order,’ which are simply desires to do or not to do one thing or another. No animal other than man, however, appears to have the capacity for reflective self-evaluation that is manifested in the formation of second-order desires.” Harry Frankfurt, *Freedom of the Will and the Concept of a Person*, (1971) 68 *The Journal of Philosophy* 5, at 7.

⁴² Taylor, note 10, at 215.

⁴³ An additional consideration of relevance here is that while “‘negative’ liberty is a recognisable construct carefully shorn of its political and social implications... what [Berlin] terms ‘positive’ liberty is a comparably careful conflation of communitarian ideas with the political abuses which have marked much of the 20th century.” Stephen Sedley, *Freedom, Law and Justice*, Sweet and Maxwell (1999), at 2, note 2.

⁴⁴ Cited in Richard Bellamy (ed.), *Victorian Liberalism: Nineteenth Century Political Thought and Practice*, Routledge (1990), at 59.

⁴⁵ What each means in practical terms is unclear. What level of coercion (or opposition, or obstruction) must I encounter before being considered unfree? Hillel Steiner’s answer is that one “is unfree if, and only if, his doing of any action is rendered impossible by the action of another individual.” Hillel Steiner, *Individual Liberty*, in David Miller (ed.), *Liberty*, Oxford University Press (1991), at 123.

relationship to freedom unchanging: freedom exists in its absence. The definition also betrays those links which exist between the question of what it means to be free and how law relates to freedom, which speaks to the very possibility of freedom in contemporary society. This is the basis of Polanyi's critique of the liberal ideal of freedom in what he describes as a 'complex' society:

“liberal philosophy... claims that power and compulsion are evil, that freedom demands their absence from a human community. No such thing is possible... This leaves no alternative but either to remain faithful to an illusionary idea of freedom and deny the reality of society, or to accept that reality and reject the idea of freedom. The first is the liberal's conclusion; the latter the fascist's.”⁴⁶

Those who adopt Berlin's preferred understanding of freedom - 'liberal freedom' ⁴⁷ - necessarily see interference as inherently reductive of liberty and so encounter the difficulty Polanyi describes. As it is neither practicable nor desirable to live in a society in which no-one is prevented from doing whatsoever he pleases, the individual must be and will be interfered with to some extent: one need not be a particularly acute observer of human psychology to know that individual drives often conflict with harmonious social existence.⁴⁸ It is therefore submitted that such a perspective on the law/freedom relationship profoundly misunderstands the nature and cause of impediments to human liberty in the world, and the relationship of law to freedom, both in general and with regards to its role in erecting or buffering those impediments. Of course, if freedom is defined in some other way the obligation to take one or the other of the paths Polanyi identifies - to choose between freedom and the reality of social existence - does not arise.

⁴⁶ Polanyi, note 19, at 257.

⁴⁷ The terminology of 'liberal', as opposed to 'negative' is useful in that it reminds us that not all freedom which is the latter is also the former. The obvious difficulty is that "John Locke, one of the founding fathers of the liberal tradition, clearly did not equate freedom with absence of constraint." Charles Larmore, *A Critique of Philip Pettit's Republicanism*, (2001) 35 *Noûs* 229, at 235. Larmore notes that Pettit's solution is to count Locke amongst the republicans: he calls that "a desperate remedy," and suggests that the correct response is in fact to admit "that the liberal tradition is not all of a piece," (at 236). Nothing in the present work turns on this: the concession demanded can be made without hesitation.

⁴⁸ A classic statement of this thesis is Sigmund Freud's *Civilisation and its Discontents* but the position is tenable even where one views humans as significantly less prone to conflict than in Freud's portrayal. We might also note Keynes' claim about the latent desirability of a system of private property: "dangerous human proclivities can be canalised into comparatively harmless channels by the existence of opportunities for money-making and private wealth" which might otherwise "find their outlet in cruelty, the reckless pursuit of personal power and authority, and other forms of self-aggrandisement." John Maynard Keynes, *The General Theory of Employment, Interest and Money* [1935], Harbinger Books (1946), at 374.

1.4 Republican freedom

The most effective response to Berlin's dichotomy has been to attempt to destabilise the categories themselves, demonstrating that his conceptual boxes cannot contain, neither logically nor historically, all that has been and might still be called 'liberty'.⁴⁹ Amongst these, republican political theory provides a profound and ultimately quite radical alternative understanding of freedom, requiring those who accept it to rethink the position of the individual within society, and providing the basis for a wide-ranging critique of liberal institutions. Republican freedom is, according to this counter-narrative, that version which was celebrated by Cicero in particular, endorsed in Roman legal thought and central to the classical republicanism rescued by Machiavelli,⁵⁰ and the 17th century English republicans who followed him. Its historical manifestations have been described by J.A.G Pocock⁵¹ and Quentin Skinner, and in the work of Philip Pettit⁵² and others it has become once more a living theory which competes with the dominant liberal perspective. Though in many ways historical (descriptive) republicanism and (normative) neo-republicanism are parallel projects (with the work of the most prominent exponents - Skinner and Pettit respectively - closely aligned), it is useful to treat them separately in acknowledgement of their different, albeit overlapping, aims.

⁴⁹ Gerald MacCallum claims that freedom is always a triadic relation "always of something (an agent or agents), from something, to do, not do, become, or not become something" and thus distinctions like that made by Berlin must be based on, e.g., the range of the term variables. Gerald C. MacCallum, *Negative and Positive Freedom*, (1967) 76 *The Philosophical Review* 312, at 314. As will become clear, this definition shares an emphasis on relationality with the vision of republican freedom endorsed in this work, but republican freedom is passive, not active, relating to what can be done to a person rather than what that person can do. MacCallum's approach is endorsed by Rawls: "The general description of a liberty, then, has the following form: this or that person (or persons) is free (or not free) from this or that constraint (or set of constraints) to do (or not to do) so and so." John Rawls, *A Theory of Justice*, Harvard University Press (1971), at 202. Rawls explicitly bypasses the debate between negative and positive liberty, as "this debate is not concerned with definitions at all, but rather with the relative values of the several liberties when they come into conflict," and so requires a theory of right and justice to answer (at 201). Larmore suggests that, in practice, he "fluctuates" between the variants: Larmore, note 47, at 238.

⁵⁰ Most prominently in the *Discourses on Livy* (1513-17) and the *Florentine Histories* (1532). McCormick suggests, however, that neo-republicans misinterpret Machiavelli in a manner which shifts his thought closer to the mainstream of republicanism: see his *Machiavelli Against Republicanism: On the Cambridge School's "Guicciardinian Moments"* (2003) 31 *Political Theory* 615.

⁵¹ J.A.G Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, Princeton University Press (1975).

⁵² Pettit's publications on republicanism include *Republicanism: A Theory of Freedom and Government*, Oxford University Press (1997); *Keeping Republican Freedom Simple: On a Difference with Quentin Skinner* (2002) 30 *Political Theory* 339; *Freedom in the Market* (2005) 5 *Politics Philosophy Economics* 131; *Neorepublicanism: A Normative and Institutional Research Program* (2009) 12 *Annual Review of Political Science* 11 (with Frank Lovett).

1.4.1 Republican historiography

Quentin Skinner has traced the history of neo-Roman, or republican, liberty: its classical roots, its revival in the early modern period, and its eventual eclipse by the idea of liberal freedom.⁵³ As Skinner tells it, the republican ideal of freedom can be divided into two parts. Firstly, a theory of human freedom is tied up in a parallel theory of free-states, such that “any understanding of what it means for an individual citizen to possess or lose their liberty must be embedded within an account of what it means for a civil association to be free.”⁵⁴ And, secondly, “what it means for an individual person to suffer a loss of liberty is for that person to be made a slave.”⁵⁵ Slavery is a condition determined by both horizontal and vertical factors: how one relates to others and how one stands in relation to the state. The two facets are necessarily intertwined.

1.4.2 The theory of free states

The ‘theory of free states’ demands that “if a state or commonwealth is to count as free, the laws that govern it - the rules that regulate its bodily movements - must be enacted with the consent of all its citizens, the members of the body politic as a whole,”⁵⁶ and “the government of a free state should ideally be such as to enable each individual citizen to exercise an equal right of participation in the making of laws.”⁵⁷ This depiction incorporates a democratic imperative whose absence in the area of liberal freedom has been noted, though one that falls short of direct democracy. One who does not live in a free state - who has no opportunity to consent to the laws, nor any possibility of participating in their making - cannot be free. This is not liberal unfreedom: the citizen of an unfree state will not inevitably find his interests subject to state interference. Instead, the fact that the laws are made and public power is exercised without his consent means that he is constantly exposed to the *possibility* of

⁵³ Including in *The Idea of Negative Liberty: Philosophical and Historical Perspectives*, in Richard Rorty, Jerome B. Schneewind and Quentin Skinner, (eds.), *Philosophy in History: Essays in the Historiography of Philosophy*, Cambridge University Press (1984); *The Paradoxes of Political Liberty*, in Sterling McMurrin (ed.) *The Tanner Lectures on Human Values*, vol. VII, Cambridge University Press (1986); *Liberty Before Liberalism*, Cambridge University Press (1997) (hereinafter, LBL); *Hobbes and Republican Liberty*, Cambridge University Press (2008).

⁵⁴ Skinner, LBL, note 53, at 23.

⁵⁵ Skinner, LBL, note 53, at 36.

⁵⁶ Skinner, LBL, note 53, at 27.

⁵⁷ Skinner, LBL, note 53, at 30. For a discussion of the idea in the context of Machiavelli’s thought see Quentin Skinner, *The Foundations of Modern Political Thought, Volume One: The Renaissance*, Cambridge University Press (1978) at 157-8.

interference. Unlike in the case of liberal freedom, “it is never necessary to suffer... overt coercion in order to forfeit your civil liberty.”⁵⁸ In direct contrast to the liberal conception, the effect of this republican perspective is that an individual can lose his freedom simply by being in a state of dependence: by being “open to danger of being forcibly or coercively deprived by the government of [his] life, liberty or estates.”⁵⁹ Perhaps the clearest statement of this viewpoint comes from Algernon Sidney, who states that:

“As liberty consists only in being subject to no man’s will, and nothing denotes a slave but a dependence on the will of another; if there be no other law in the kingdom than the will of a prince, there is no such thing as liberty.”⁶⁰

From the marriage of the theories of free individuals and of free states results the proposition that “if you live under any form of government that allows for the exercise of prerogative or discretionary powers outside the law, you will already be living as a slave.”⁶¹ The debilitating effect of unconsummated potential for interference is recognised where Berlin makes no mention of it. This idea of freedom remains, however, wedded to the presumption that it is the state which renders unfree. To use the rhetoric of the master and slave (a private relationship, largely separate in its immediate functioning from the state apparatus) but miss the point that private actors can themselves be the source of constraints on freedom is disappointing. The entry into the republican discourse of the language of slavery and freedom where the dominating party is the state should stand alongside, not displace, the relationships which the vocabulary was initially used to describe.

1.4.3 The republican eclipse

Republican freedom, Skinner tells us, came under attack by Hobbes and the liberal thinkers who followed him, and eventually “the ideological triumph of liberalism left the neo-roman theory largely discredited.”⁶² This was achieved in part through the introduction of the state

⁵⁸ Skinner, *LBL*, note 53, at 69.

⁵⁹ Skinner, *LBL*, note 53, at 69.

⁶⁰ From the *Discourses Concerning Government*, quoted in Skinner, *LBL*, note 53, at 86-7.

⁶¹ Skinner, *LBL*, note 53, at 69.

⁶² Skinner, *LBL*, note 53, at x.

of nature, an idea central to much post-Hobbes political thinking but “wholly foreign to the Roman and Renaissance texts,”⁶³ which treats the existence of an organised public power as depriving individuals of the freedom which exists in its absence. Elsewhere, Skinner has traced the triumph of liberal freedom within the microcosm of Hobbes’s own writings, demonstrating that where he had previously “defined liberty ... as the absence of impediments to motion”, in his *Leviathan* “the concept of an arbitrary impediment is silently dropped. The only impediments that take away liberty are now said to be those which have the effect of leaving a body physically disempowered.”⁶⁴ This makes Hobbes the first thinker to contradict the republican theorists “by proffering an alternative definition in which the presence of freedom is construed entirely as absence of impediments rather than the absence of dependence”⁶⁵ The narrative is compelling: the more subtle and nuanced understanding (by implication, the ‘truer’ one) was pushed aside by the Hobbesian attack, such that the neo-Roman vision of freedom was almost entirely forgotten. With the excavation and reconstruction of republican freedom, Skinner suggests, we can understand the ways in which the liberal understanding of freedom misleads. The absolutism of Hobbes, remnants of which linger in Berlin’s acknowledgement of the contingency of democracy, would be thus overcome.⁶⁶

1.4.4 The first republican revival

Skinner’s work was not alone in attempting to induce a republican revival. It appeared in the wake of scholarship that was ‘republican’ in character without stressing the link between free-states and free-people but without positing the differing conceptions of freedom as the axis along which the separate paradigms distinguish themselves. Bernard Bailyn’s ‘The

⁶³ Skinner, LBL, note 53, at 19.

⁶⁴ Skinner, HRL, note 53, at 127-8. For the claim that the effect of this alteration is to render the concept “completely vacuous, nothing more than freedom of movement, a *reductio ad absurdum* surely designed to mock us all,” see Patricia Springborg, *Liberty Exposed: Quentin Skinner’s Hobbes and Republican Liberty*, (2010) 18 *British Journal for the History of Philosophy* 139, at 159.

⁶⁵ Skinner, HRL, note 53, at 157.

⁶⁶ Skinner’s interpretation is not the only one available. Viroli sees liberalism not as having displaced republicanism, but as having narrowed its focus, republicanism being the prior whole of which liberalism is only part: Maurizio Viroli, *Republicanism*, Henry Holt & Company (2003), at 7. Patricia Springborg suggests that liberalism is merely republicanism with “the refinements of Roman law and its successor, ecclesiastical natural law, stripped away.” in *Mary Astell: Theorist of Freedom From Domination*, Cambridge University Press (2005), at 212. For a recent overview of the historiography of republicanism see Rachel Hammersley, *The Historiography of Republicanism and Republican Exchanges*, (2012) *History of European Ideas* 1.

Ideological Origins of the American Revolution,’⁶⁷ Gordon S. Wood’s ‘The Creation of the American Republic,’⁶⁸ and J.G.A. Pocock’s ‘The Machiavellian Moment’⁶⁹ all highlight the influence of certain republican concerns across time and space without taking the reductive path which is a compelling feature of Skinner’s republicanism.⁷⁰ These works contributed to a reappraisal of the dominant ideals in early American history, displacing a complacent account of wide acceptance of Lockean themes: “The Beardian paradigm organized American history around a restless sea of conflicting material interests; the Hartzian around a stable liberal consensus; the republican around the importance of liberalism’s precedents and rivals.”⁷¹ They inspired the hunt for republican ideas throughout history, and the mapping of these themes onto extant criticisms of liberal thought came to play an important role in legal scholarship. Where the neo-republican revival intertwines history and theory, here the relationship is sequential: the historical precedes the theoretical, which draws and expands upon it in specific contexts. This might be said to reflect the length of the shadow cast over American politics by the founding: he who proffers a new account of that period puts up for grabs all that follows. A number of attempts were made to employ republican themes to construct a viable alternative to the dominant liberal individualism: Michael Sandel,⁷² Charles Taylor⁷³ and others “attacked liberalism’s atomic individualism and bureaucratic proceduralism and argued instead for a community politics of participatory democracy built around a commitment to the common good,”⁷⁴ rejecting the neutrality of the state with regard

⁶⁷ Bernard Bailyn, *The Ideological Origins of the American Revolution*, Harvard University Press (1971).

⁶⁸ Gordon S. Wood, *The Creation of the American Republic*, University of North Carolina Press (1969).

⁶⁹ Pocock, note 50.

⁷⁰ In Daniel T. Rodgers, *Republicanism: The Career of a Concept*, (1992) 79 *Journal of American History* 11, at 11, Rodgers identifies Robert E. Shalhope, *Toward a Republican Synthesis: The Emergence of an Understanding of Republicanism in American Historiography*, (1972) *William and Mary Quarterly* 29, as the point at which republicanism was “First given formal analytic and conceptual identity.” It might be traced back further, perhaps to Zera Fink’s *The Classical Republicans: An Essay in the Recovery of a Seventeenth Century Pattern of Ideas*, Northwestern University Press (1945). G. Edward White, in his reflections upon the republican revival, assesses it in ultimately positive terms – it was to be “treated as an opportunity to renew one’s commitment to scholarship that breaks down, at least temporarily, scholarly barriers and expands the community of academics with shared intellectual pursuits.” G. Edward White, *Reflections on the “Republican Revival”*: *Interdisciplinary Scholarship in the Legal Academy*, (1994) 6 *Yale Journal of Law & the Humanities* 1, at 33.

⁷¹ Rodgers, note 70, at 12. The references are to Charles Beard, *An Economic Interpretation of the Constitution of the United States* (1913), and Louis Hartz, *The Liberal Tradition in America: An Interpretation of American Political Thought since the Revolution* (1955).

⁷² Michael Sandel, *Democracy’s Discontent: America in Search of a Public Philosophy*, Harvard University Press (1996).

⁷³ Charles Taylor, *Sources of the Self: The Making of the Modern Identity*, Cambridge University Press (1989) and Charles Taylor, *Cross-Purposes: The Liberal-Communitarian Debate*, in *Philosophical Arguments*, Harvard University Press (1997).

⁷⁴ Richard Bellamy, *Being Liberal with Republicanism’s Radical Heritage*, (2002) 8 *Res Publica* 269, at 269.

to the good insisted on by liberals such as Rawls.⁷⁵ This movement, lasting roughly from the 1960s until the early-1990s, might be grouped together as the first republican revival, to distinguish it from the second, qualitatively different, revival led by Skinner and Pettit. Though the themes of the first republican revival were many, an early summary remains useful: “Republicanism meant maintaining public and private virtue, internal unity, social solidarity, and it meant constantly struggling against ‘threats’ to the ‘republican character’ of the nation.”⁷⁶

1.4.5 Vagueness and communitarianism

There are significant difficulties associated with the themes of this first republican revival. For example, a prominent characteristic of republican thought as understood by its proponents in the period in question is the heavy emphasis on poorly defined intangibles.⁷⁷ Virtue, courage, character - all have been the focus of republican works, yet are of dubious utility to the task of analysing specific political formation and actually existing institutions.⁷⁸ Further, and relatedly, much scholarship associated with this research programme was characterised by its communitarian emphasis: “Among the signal themes in this alternative way of thinking are the dependence of the individual on the community for his or her identity and values, the virtues required of individuals for a community and polity to flourish, and the equation of individual freedom... with active participation in the process of collective will formation.”⁷⁹

Communitarianism can be understood by comparison with the claim - associated with Rawlsian liberalism - that society should not be founded on any particular conception of the good and so the role of the state is merely to secure the ‘right’. Each individual “has his or her conception of a good or worthwhile life” and “[t]he function of society ought to be to facilitate these life plans, as much as possible, and following some principle of equality.”⁸⁰ Rawls employs a ‘thin’ conception of the good, “restricted to the bare essentials,” in arguing

⁷⁵ John Rawls, *A Theory of Justice*, Harvard University Press (1971).

⁷⁶ Shalhope, note 70, at 72.

⁷⁷ Shalhope, note 70, at 72.

⁷⁸ Virtue, and its antithesis, corruption, is a particular theme of Pocock, note 50, which draws on the treatment of the topic in Machiavelli’s *Discourses*.

⁷⁹ Pettit/Lovett, note 52, at 12.

⁸⁰ Taylor, *Cross-Purposes*, note 73, at 197.

for the principles of justice, to which he opposes a separate ‘full’ theory of the good, which “takes principles of justice as already secured, and then uses these principles in defining the other moral concepts in which the notions of goodness are involved.”⁸¹ In a well-ordered society, “citizens hold the same principles of right” but “individuals find their good in different ways, and many things may be good for one person that would not be good for another,”⁸² goodness having no necessary moral content.⁸³

Within the liberal worldview there is therefore no room for a unitary socially-endorsed conception of the ‘good life’. Against this, communitarianism posits (on one account) that political institutions are not merely a means of guaranteeing to the individual the space in which to pursue his conception of the good, but are instead “a common bulwark of citizen dignity,”⁸⁴ and so the ‘republic’ must be “animated by a sense of a shared immediate common good.”⁸⁵ Communitarianism has an existence independent of republicanism, but insofar as it is a variant of the latter, it is described as neo-Athenian, an acknowledgement that its influences are to be found elsewhere in the ancient world from those of neo-Roman freedom. Yet communitarianism, a version of positive freedom, carries with it the attendant problems, particularly an uneasy relationship with value pluralism: Berlin’s reasons for rejecting positive freedom – the danger of switching “the individual with his actual wishes” for “the ‘real’ man within,”⁸⁶ give reason to hesitate in suggesting that there is, or should be, a single understanding of the good. To the extent that it is communitarian republicanism is more valuable as a critique of the shortcomings of modern liberalism and the associated selfish individualism than as an alternative to them. Republican pluralists can endorse the claim that main achievement of the work of Philip Pettit on republicanism was “to save the tradition from the communitarians.”⁸⁷

⁸¹ Rawls, note 49, at 398.

⁸² Rawls, note 49, at 393.

⁸³ Rawls, note 49, at 354.

⁸⁴ Taylor, *Cross-Purposes*, note 73, at 198.

⁸⁵ Taylor, *Cross-Purposes*, note 73, at 200.

⁸⁶ Berlin, note 4, at 181.

⁸⁷ Bellamy, note 74, at 269.

1.4.6 Normative and descriptive communitarianism

The foregoing account is a suitable response to the communitarian tendency in republicanism only if that communitarianism is understood as a normative phenomenon. Alternatively, a descriptive communitarianism might take two forms. The first involves the claim that individuals are necessarily in part constituted by their community. Such a claim is only weakly communitarian - it need make no explicit reference to the features of the community as an entity, nor any shared commitment of its members; merely that being within one community rather than another is part of what constitutes an individual as the person that he or she is.⁸⁸ It is best understood as a corrective to abstract individualism, which purports to make sense of an individual's being without reference to the temporal and geographical circumstances in which that individual is embedded. A second form of descriptive communitarianism is more closely related to its normative incarnation, involving the claim that there is *necessarily*, at the heart of every political community some form of shared value. Said value need not be a conception of the good: it might be a shared belonging to a national group, in which case theories of nationalism are communitarian,⁸⁹ or the shared background conditions which make possible communication.⁹⁰ In seeking to describe the functioning of communities and the extent to which the individual is constituted by membership of them, a descriptive communitarianism desires to comprehend the relationship between individual and community, rather than subordinating the former to the latter. It does not challenge neo-republicanism's anti-communitarian bent.

1.4.7 The collapse of the first republican revival

These are not the only reasons for which the second republican revival has been successful in supplanting the first: both Pocock's book and the other key texts of the first republican revival were "difficult to the verge of unreadability, highly intellectualistic, and in many

⁸⁸ E.g., Peter L. Berger and Thomas Luckmann, *The Social Construction of Reality*, Penguin Books (1967), at 194-5.

⁸⁹ Though not necessarily so: e.g., Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship*, Oxford University Press (2001).

⁹⁰ Habermas describes "the structures of a state of pre-understanding already reached within an intersubjectively shared lifeworld.": *A Reply*, in Axel Honneth and Hans Joas (eds.), *Communicative Action*, Polity Press, (1991) at 223.

respects as consensual as the consensus history they were designed to supplant.”⁹¹ Those who followed had considerable scope to adapt the revived republicanism for their own purposes, and so the first revival inaugurated proved unsustainable, being so multi-faceted as to undermine its coherence. It was:

“swept up as short-hand for everything liberalism was not: commitment to an active civic life (contra liberalism's obsession with immunities and rights), to explicit value commitments and deliberative justice (as opposed to liberalism's procedural neutrality), to public, common purposes (contra liberalism's inability to imagine politics as anything other than interest group pluralism)”⁹²

The claim that “employed for too many ends and distended too far, [republicanism] ran the danger of explaining everything”⁹³ is undoubtedly true, but one is struck also by the fleeting nature of many thinkers’ engagement with the first revival; the wide spread of republican influence correlated with a shallow penetration of its ideals.⁹⁴ It is perhaps not surprising that Skinner’s work was so successful in directing the focus of republican scholarship onto questions of freedom and domination: any sort of focus at all was liable to supplant the confused and confusing morass of ideas that republicanism had become.

1.5 Pettit’s neo-republicanism

Alongside Skinner’s historical work, that of Philip Pettit offers a systematised theory of freedom as non-domination, commending it simultaneously for its historical provenance and its inherent virtue.⁹⁵ Not only is the ideal of non-domination a distinctive interpretation of what it means to be free, but for Pettit it has a strong claim to be the only value underlying our political institutions.⁹⁶ The two are mutually independent: the political theory of neo-republicanism stands apart from the republican historiography and must be judged on its own

⁹¹ Rodgers, note 70, at 12.

⁹² Rodgers, note 70, at 33.

⁹³ Rodgers, note 70, at 38. Similarly, see White, note 70, at 32, claiming that the “historical community, in its enthusiasm for the concept of republicanism, pressed it beyond its temporal and cultural contexts, thereby distorting it to the point it that it could be further distorted by nonhistorians.”

⁹⁴ This is true for many of its most significant legal instantiations: e.g., Cass Sunstein, *Beyond the Republican Revival*, (1988) 97 Yale Law Journal 1539; Frank Michelman, *Law’s Republic*, (1988) 97 Yale Law Journal 1493.

⁹⁵ Pettit, note 27.

⁹⁶ Pettit, note 27, at 81.

merits. It is in Pettit's work that republican thought achieves sufficient coherence to overcome the fragmentation of previous attempts to revive it and takes on what has become its predominant form.

1.5.1 From interference to domination

The central fact of the conception of freedom promoted by Pettit is its substitution, for the usual concern with interference, of what he describes as 'domination', so that instead of 'freedom as non-interference,' we deal with 'freedom as non-domination,' where domination arises from the ability of one party to interfere arbitrarily - rather than to merely interfere - with the interests of another.⁹⁷ This has two important consequences. On the one hand, interference does not render the subject unfree when executed on a non-arbitrary basis; on the other, where the subject is open to interference on an arbitrary basis, this potential renders her unfree, even if not realised in practice. The distinction between interference and domination allows for the possibility that an act of interference, far from being freedom-reducing, will reduce domination and so increase freedom. The second point - that domination without interference reduces freedom - distinguishes the republican treatment of the slave with the benevolent master from that of liberal freedom, which considers that slave free until such time as the master in fact interferes with his interests.⁹⁸ Domination without interference and

⁹⁷ It would be useful to have some idea of how Hayek understands that concept and, in particular, whether he regards arbitrariness as a necessary feature of freedom-reducing interference. Unfortunately, in the chapter of his *The Constitution of Liberty*, Routledge (1960) devoted to definition, he is inconsistent. Freedom is described as the state in which one "is not subject to coercion by the arbitrary will of another or others" and the fact of "independence of the arbitrary will of another," but we are also told that the "task of a policy of freedom is to minimize coercion," with no reference made to its arbitrariness (at 12). Coercion occurs "when one man's actions are made to serve another man's will, not for his own but for another's purpose," (at 133). It is unclear if we are to reduce dependence on another's will generally or only where that will is arbitrary. The way around this impasse seems to be provided by the recognition that the above definition of coercion is so broad that Hayek sees arbitrariness where others see none: unfreedom requires coercion which in turn requires arbitrariness, but arbitrariness exists wherever one does not get his own way (so to be on the wrong side of a democratic process is to find oneself serving another's will). This might be reconceived as a vastly degraded variant of the non-domination ideal. Gray suggests that it leads him to a positive conceptions of liberty: John Gray, *Hayek on Liberty, Rights, and Justice*, (1981) 92 *Ethics* 73.

⁹⁸ Fabian Wendt disagrees, suggesting that "the problem of the slave with the benevolent and non-interfering master is not, basically, his liberty... but his status as somebody owned by another person. The slave is a person who has been denied her self-ownership." Fabian Wendt, *Slaves, Prisoners, and Republican Freedom*, (2011) 17 *Res Publica* 175, at 179. For the claim that the focus on arbitrary interference is unsuited to the problem of power in the modern world, see Michael J. Thompson, *Reconstructing Republican Freedom: A Critique of the Neo-Republican Conception of Freedom as Non-domination*, *Philosophy & Social Criticism* (forthcoming, 2013).

interference without domination; from these two simple points of divergence between republican and liberal freedom follow the radical consequences of republicanism.⁹⁹

Focusing, like Skinner, on the master-slave relationship as the paradigm of the dominating relationship, Pettit tells us that what such a relationship means in practice is that “the dominating party can interfere on an arbitrary basis with the choices of the dominated: can interfere, in particular, on the basis of an interest or an opinion that need not be shared by the person affected.”¹⁰⁰ The issue of what constitutes arbitrariness becomes paramount, and Pettit defines it in distinctively:

“An act is perpetrated on an arbitrary basis, we can say, if it is subject just to the *arbitrium*, the decision or judgement, of the agent; the agent was in a position to choose it or not choose it, at their pleasure... without reference to the interests, or the opinions, of those affected.”¹⁰¹

Inverting this definition, we see that non-freedom-reducing interference is that which is not arbitrary; which takes place with reference to the interests of those affected. We now understand what constitutes domination and how we might seek to minimise its prevalence.

1.5.2 The particularity of Pettit’s arbitrariness

The definition of arbitrariness which stands at the centre of the republican conception of non-domination is overly specific. To make use of the ideal beyond the vertical relationships to which it has largely been restricted, it suits us to invert it: to say that, rather than arbitrariness resulting from a failure to track the interests of those whose interests are being interfered with, that the tracking of interests in the exercise of power will indicate that the exercise of that power is non-arbitrary. Rather than being incorporated within the definition of arbitrariness,

⁹⁹ Skinner clarifies that what matters is not the security of one’s liberty (as liberal thinkers have claimed), nor that republican unfreedom is constituted by dependence rather than coercion, but that “to live in a condition of dependence is in itself a source and form of constraint.” Skinner, *LBL*, note 53, at 84.

¹⁰⁰ Pettit, note 34, at 22.

¹⁰¹ Pettit, note 34, at 55. Nothing turns herein on the claim that this is the correct translation of the term ‘*arbitrium*’. However, Patricia Springborg has questioned the interpretation of related terms of Roman law: “To restore the meaning of *arbitraria* requires that we adjust the definition of republicanism accordingly: it is ‘freedom from domination’, where domination is to live at the will of a master, but a master governed by rule of law or due process.” Springborg, note 64, at 155.

this sort of tracking becomes a defence to a charge of the existence of an illegitimate ability to interfere. It is downgraded from a necessary to a merely sufficient condition which is one amongst many. This move makes room for those specific forms of arbitrariness which are of analytical utility in the contexts of horizontal relationships and law.

1.6 Methodology: freedom from who?

Three features of the neo-republican methodology must be highlighted. Though this is not the understanding promoted by Berlin, liberal freedom is an ideal which makes sense only where the perceived threat to liberty is the state.¹⁰² In the modern world, the individual's interests are interfered with at all times, from all sides. To assume that all interference reduces freedom is to conclude that the individual is not, and cannot, be free horizontally. Not only is freedom from third-party interference an unachievable ideal, it is an incoherent one. Implicit, therefore, within opportunity conceptions of freedom is a series of assumptions as to how freedom might be compromised, and by whom. It is right and proper, given the context in which he wrote, that Berlin's conception is oriented to the state as oppressor, but we should resist complacent universalization of that orientation. Pettit explicitly distinguishes between two forms of power which might dominate, identified according to their respective source: imperium, which is based on public authority, and dominium, which is private power.¹⁰³ The terminology of vertical and horizontal domination might be preferred insofar as it indicates certain helpful legal analogies. The former has come to dominate discussions of republicanism from a legal perspective; a myopia which prevents neo-republicanism from fulfilling its potential. The present project places horizontal domination at its centre.

1.6.1 Relationality

A second methodological point is closely related, drawing upon a lesson offered by the conflict of liberal and communitarian thought. Liberalism is associated with a methodological individualism, which "asserts that all attempts to explain social (or individual) phenomena

¹⁰² This is not to say that horizontal relations do not feature: the most famous principle of liberal thought, Mill's harm principle, defines the acceptable degree of vertical interference in terms of a horizontal relation between an individual on whom the individual is perpetrated and his fellow man.

¹⁰³ Pettit, note 34, at 112.

are to be rejected ... unless they are couched wholly in terms of facts about individuals.”¹⁰⁴ A paradigmatic example of such a claim would be that of Bentham:

“The community is a fictitious body, composed of the individual persons who are considered as constituting as it were its members. The interest of the community then is, what? - the sum of the interests of the several members who compose it.”¹⁰⁵

The community has neither an existence nor an interest separate from the aggregate of its members. Communitarian arguments, on the other hand, in positing the existence of a discrete public interest apart from this process of aggregation, are necessarily committed to the existence of a unit of enquiry other than the individual to which to ascribe such interest. Each has obvious shortcomings. Methodological individualism struggles to accommodate a distinct public interest and so is condemned to understand politics as mere interest group pluralism; neither can it provide explanations of macro-level phenomena that result from anything other than the intentions of individuals (thereby explaining its frequent invocation in opposition to historical materialism), while communitarian positions threaten to reify metaphysical entities and in turn subsume or obliterate the individual.¹⁰⁶

Against these, the neo-republican ideal has a relational quality which allows one to sidestep the individualistic assumptions of liberal and libertarian thought without replacing them with communitarianism’s similarly dubious presuppositions. Relational theory requires that we “reject the notion that one can posit discrete, pregiven units such as the individual or society as ultimate starting points” of our analysis¹⁰⁷ - a rejection that has found purchase in recent sociological thought.¹⁰⁸ Rather than being the discrete elements of a society which ‘exists’ merely as their aggregation, individuals are “inseparable from the transactional contexts

¹⁰⁴ Steven Lukes, *Methodological Individualism Reconsidered*, (1968) 19 *British Journal of Sociology* 119, at 123. The approach can be traced back to Max Weber’s *Economy and Society* [1922].

¹⁰⁵ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, in Alan Ryan (ed.), *Utilitarianism and Other Essays*, Penguin Books (2000), at 66.

¹⁰⁶ A third option accepts the existence of both individual and society as units of enquiry, but posits their existence as dialectical in nature. For an example, see Berger and Luckmann, note 91.

¹⁰⁷ Mustafa Emirbayer, *Manifesto for a Relational Sociology*, (1997) 103 *American Journal of Sociology* 281, at 287.

¹⁰⁸ Pierpaolo Donati, *Relational Sociology: A New Paradigm for the Social Sciences*, Routledge (2011).

within which they are embedded.”¹⁰⁹ Such assertion recalls Marx’s claim that “society does not consist of individuals, but expresses the sum of interrelations, the relations within which these individuals stand”¹¹⁰ (but deconstructs the phenomenon so as to be able to consider the relations individually as well as in aggregation) and, before him, the Hegelian focus upon the inter-subjective dimension of selfhood, as reflected in his insistence that the self is constituted as such only at the point of mutual recognition with another.¹¹¹ One effect of the relationality of neo-republican thought is to exclude from the idea of unfreedom any obstacle to action that is internal to the individual: the questions of ability and inability which, without further distinction, Van Parijs puts at the centre of ‘real’ freedom therefore play no role in neo-republican freedom.¹¹²

1.6.2 Embeddedness

The incompatibility of methodological individualism with neo-republican freedom is shown most clearly by attempts to encode the atomic individual into its ideals. If one is free insofar as not interfered with in the liberal worldview, an isolated individual, alone in the world, is paradigmatic of the condition of freedom. Nobody interferes with him, for there is nobody to interfere with him. Where our ideal is the republican one, and freedom non-domination rather than non-interference, the result changes. A man is unfree if there is another with the opportunity to interfere arbitrarily with his interests. If there is no other, however, then while it is true that there is no-one able to arbitrarily interfere with his interests, he is not therefore free. His situation is merely incapable of being understood by a republicanism which sees him as necessarily embedded. As with Hegel’s requirement of inter-subjectivity to constitute the self, we conclude that man can be free only when he is not alone.

The relational quality of republican freedom and its inability to speak to the condition of the atomised individual is linked with a sometime republican theme upon which we must once

¹⁰⁹ Emirbaye, note 107, at 287.

¹¹⁰ Karl Marx, *Grundrisse*, Penguin Books (2005), at 26.

¹¹¹ Hegel’s account of the journey of the self through to self-consciousness is found in his *Phenomenology of Spirit*, Galaxy Books (1979), at 104-38 For discussions as to the possible links between Hegelian thought and the neo-republican project, see Michael P. Allen, *Hegel Between Non-domination and Expressive Freedom: Capabilities, Perspectives, Democracy*, (2006) 32 *Philosophy & Social Criticism* 493, and James Bohman, *Is Hegel a Republican? Pippin, Recognition, and Domination in the Philosophy of Right*, (2010) 53 *Inquiry* 435.

¹¹² Philippe Van Parijs, *Real Freedom for All: What (If Anything) Can Justify Capitalism?*, Oxford University Press (1998), at 20-4.

again insist as a corollary of the neo-republican revival: the commitment to plurality. We might consider its starting point to be Aristotle's insistence that "the state is a creation of nature, and that man is by nature a political animal," even if in that case the political nature is held to be proven by the fact that "man is the only animal who has the gift of speech," a power which "is intended to set forth the expedient and the inexpedient, and therefore likewise the just and the unjust."¹¹³ Arendt too places the condition of plurality - "the fact that men, not Man, live on the earth and inhabit the world" - at the centre of human existence: it is "*the condition* - not only the *condition sine qua non*, but the *condition per quam* - of all political life."¹¹⁴ The condition of plurality frequently re-emerges, yet without moving to the forefront as a necessary condition of 'republicanness'. It reveals an important truth which is obscured by individualism and which contributes to the superiority of republicanism over liberalism - the ability of the former to understand the individual as *necessarily* embedded in the social context, rather than treating society as the effect of the contingent proximity of multiple individuals. Such necessity permits the completion of our methodological circle: if one necessarily exists in a condition of plurality, then the question of horizontal freedom must be central to emancipatory project, as it is for neo-republican thought. A characteristic position of classical republicanism in this way recurs through logical implication in neo-republican thought. The most important difference between the alternative accounts of liberty, therefore, is that the latter is tied up in this sort of social existence and thus, unlike the former, not hostile to and inevitably diminished by the fact of plural living. We must share the world in which we live, and any suggestion that it would be more desirable - that we would be freer - were we not required to do so, must be resisted.

1.7 Conclusion

The publication of Pettit's book marked the birth of a 'research program,'¹¹⁵ the aim of which "is to rethink issues of legitimacy and democracy, welfare and justice, public policy and institutional design, from within the framework that these basic ideas provide."¹¹⁶ The project has transferred certain themes from a historical context to the realm of living political theory and demonstrated how the language of domination still resonates in the modern world. It is

¹¹³ Aristotle, *Politics*, 1:2.

¹¹⁴ Hannah Arendt, *The Human Condition*, University of Chicago Press (1958), at 7.

¹¹⁵ Pettit has indicated a preference for this term. See Pettit and Lovett, note 52, at 12.

¹¹⁶ Pettit and Lovett, note 52, at 12.

not the only republicanism: the relative clarity of the signifier in this context co-exists with rather than displaces the multiplicity of alternative definitions. It is with this republicanism, distinguished first and foremost by the understanding of freedom which it endorses and from which many of its associated concerns flow, that we will concern ourselves, though with the occasional foray back into the historical tradition in order to reflect upon some point of sympathy or divergence. It is a product of its past, as a measure both of what it is and what it is not, but transcends it. Tempting though it is to shed the terminology in which the potential for confusion is carried, to do so would be a net loss for the neo-republican project.

The republican ideal of freedom as non-domination provides a normative ideal suited to the analysis of the individual in relation both to the public power with which liberal thought is principally concerned and the horizontal relations which exist by virtue of the necessary plurality of human existence. In both cases, and assuming there exists an organised public power, a state apparatus of some sort, then a certain degree of interference is inevitable. The republican ability to distinguish interference which reduces freedom from that which does not is therefore its primary virtue. It now falls to consider the interaction between these historical and vertical relations, starting with the role of law.

Part 1 - Chapter 2 - Freedom between anarchy and absolutism

2.1 Consequences of neo-republicanism

Our first chapter explained and defended the neo-republican ideal of freedom as non-domination. This second chapter makes some observations about the consequences of that ideal for law. It proceeds in three stages. The first addresses the issue of law and freedom, arguing against the claim that law is inherently reductive of freedom. The second provides an alternative perspective on the issue by returning to the Hobbesian state of nature metaphor as a way of demonstrating the human condition; the relationship between law and freedom cannot be understood separately from the idea of an organised public power whose deployment is determined by law. The Hobbesian device of considering a world in which law is absent because no such power exists permits a discussion of law and freedom which clarifies rather than obscures. The third stage of the argument connects the republican ideal of non-domination to the values pursued by the idea of the rule of law.

2.2 Law and freedom

According to prominent liberal accounts, in keeping with the liberal conception of freedom as non-interference, *all* law, whatsoever its content, has the effect of reducing the freedom of those who live under it. In Bentham's words:

“As against the coercion applicable by individual to individual, no liberty can be given to one man but in proportion as it is taken from another. All coercive laws, therefore... and in particular all laws creative of liberty, are, as far as they go, abrogative of liberty.”¹

Where one takes this view, certain consequences might follow. One might reject law (and by implication the system of organised public power) generally - the true anarchist position whose problematic relationship with private property renders it now unfashionable - or demand that its use be kept to the minimum necessary. This might mean taking the position,

¹ Jeremy Bentham, *Anarchical Fallacies*, in Jeremy Waldron (ed.), *'Nonsense Upon Stilts': Bentham, Burke and Marx on the Rights of Man*, Taylor & Francis (1987) at 57.

for example, that “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others,”² or, more generally, by insisting upon a night-watchman state of the type defended by Robert Nozick.³ Both are well-attested within very different branches of the broad liberal tradition. Alternatively, one might deny the value of liberty, holding that its reduction by law is irrelevant, or subordinate it to some other good, so that the reduction in liberty is a price worth paying for the alternative good which we acquire through law, a position which can apply in the context both of the binary question of law or no-law, and to specific instantiations of law.⁴

2.2.1 Individual freedom and net freedom

If it is assumed both that law is a necessary social institution, and that all law is, as Bentham suggests, to a greater or lesser degree reductive of liberty, then one who desires the maximum possible liberty can endorse only those laws which alongside such reduction bring a countervailing increase in liberty, in which case law promotes freedom - but only indirectly, as a consequence of its primary, freedom-reducing, function. Berlin interprets Hobbes:

“Law is always a ‘fetter’, even if its protects you from being bound in chains that are heavier than those of law, say, some more repressive law or custom, or arbitrary despotism or chaos.”⁵

Beyond the requirement of a net increase in freedom, it is unclear what in this perspective prevents law from being employed in ways that are morally repugnant or create a surplus of

² John Stuart Mill, *On Liberty*, in *On Liberty and Other Essays*, Oxford University Press (1991), at 14.

³ Robert Nozick, *Anarchy, State and Utopia*, Basic Books (1974). Nozick he holds the development of a minimal state to be inevitable, via the evolution of series of private ‘protective associations’ which exist in order to vindicate natural rights and one of which will eventually become dominant and so no longer entitled to refuse to employ its newfound monopoly on force to protect the rights of those who did not originally subscribe to it. Nozick’s is an invisible hand, rather than a contractarian, account of the coming into being of the state.

⁴ The classic example of this is the Hobbesian trade of liberty and security, which occurs at the systemic level, but it will be understood how the law against murder has the same effect: it reduces with individual’s range of permitted actions, but promotes a greater good. Where this greater good is freedom itself, the reduction of a murderer’s freedom promotes the freedom of those who he does not murder. This is problematic in that punishment is ex-post – we do not protect the freedom of the victim itself so much as that of those who might have been murdered subsequently.

⁵ Isaiah Berlin, *Two Concepts of Liberty*, in *Liberty*, Oxford University Press (2002), at 170, note 3.

liberty only at the cost of extreme limitations on the liberty of some minority⁶ - laws, for example, whose effect is to systematically degrade the liberty of some section of the community, but which are held to be necessary to protect the liberty of the majority:⁷

“If law infringes liberty as a matter of necessity, however, then all that liberty clearly requires of law and of the constitutional framework as a whole is that it does better in preventing offences against liberty than in perpetrating them... liberty will be consistent with a variety of what we naturally regard as constitutional abuses, so that a case cannot be made against such abuses on the ground of liberty alone.”⁸

Looking back at the claim by Bentham cited above - “no liberty can be given to one man but in proportion as it is taken from another. All coercive laws, therefore... are, as far as they go, abrogative of liberty” - it is difficult to interpret it even this generously. If “no liberty can be given to one man but in proportion as it is taken from another,” then we are dealing with a zero-sum game, in which the net quantum of liberty is necessarily constant. The possibility of a net increase in liberty disappears (one man’s liberty with respect to the law may be increased by repeal of that law, but some other person’s is necessarily decreased).⁹ The law merely redistributes liberty, such that for every person who enjoys an increase in liberty, we must accept a corresponding loss, by some other person or persons, of that same extent of liberty. Law-making dissolves into a question of shameless favouritism: only some can

⁶ This echoes the most important criticism of the Benthamite utilitarianism, understood as the imperative of achieving the greatest good for the greatest number, which might be fulfilled by actions which greatly harm a small number of individuals if the utility which accrues to the majority is sufficient to outweigh it. Bentham’s doctrine is outlined in Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, Clarendon Press (1996). This assumes liberty can be meaningfully quantified, if not absolutely, then at least in relative terms.

⁷ Waldron has argued that the image of balance used to justify repressive laws is inappropriate given that the reduction in liberty balanced against supposedly greater security falls only on one section of society, rather than society at large: Jeremy Waldron, *Security and Liberty: The Image of Balance*, (2003) 11 *The Journal of Political Philosophy* 93.

⁸ Philip Pettit, *Law and Liberty*, in Samantha Besson and José Luis Martí (Eds.), *Legal Republicanism: National and International Perspectives*, Oxford University Press (2009), at 40.

⁹ “Liberty, as against the coercion of the law, may, it is true, may be given by the simple removal of the obligation by which that coercion was applied.” Bentham, note 1, at 57 – but, of course, in providing this liberty, the person to whom the obligation was owed has his liberty curtailed.

benefit from the freedom it bequeaths, and for those to benefit, others must lose out.¹⁰ The possibility of generalised liberty through law recedes.

2.2.2 Which laws reduce freedom?

It is important to be clear as to the form(s) of law at issue here. Bentham makes several gestures indicating that the manner in which law relates to liberty varies, and that not all laws are equal in their effect upon freedom. He distinguishes laws which are coercive simpliciter (in which case the relevant coercion is that of the state) from those which are coercive because they create rights and thus allow for coercion between individuals.¹¹ These categories seem to correspond to those of criminal law and private law: though criminal law is vertical in orientation and private law horizontal, both are coercive and thus reductive of liberty, but the latter create legal rights and therefore redistributes liberty, where the former protect liberty only indirectly, by prohibiting conduct which itself reduces freedom.¹² From the realm of coercive laws, and therefore those which reduce liberty, Bentham excludes “constitutional laws, and laws repealing or modifying coercive laws.”¹³ Whether or not one adopts Bentham’s specific conclusion, the acknowledgement of a relevant distinction between private and constitutional law is an important one. It is unfortunate that where Philip Pettit quotes Bentham, the parentheses within which the exclusion of constitutional law is contained are excised: “All coercive laws, therefore (that is, all laws but constitutional laws, and laws repealing or modifying coercive laws) and in particular all laws creative of liberty, are, as far as they go, abrogative of liberty”¹⁴ becomes “All coercive laws, therefore... and in particular all laws creative of liberty, are, as far as they go, abrogative of liberty.”¹⁵ This claim is both more interesting and more persuasive with the words in brackets left *in situ*; the possibility of a differential relation to freedom on the part of those laws which structure the

¹⁰ One way round this impasse might be a variant on Rawls’ ‘difference principle’, whereby any distribution of entitlements can be justified only if it benefits the least well off. John Rawls, *A Theory of Justice*, Harvard University Press (1974), at 68.

¹¹ Bentham, note 1, at 57.

¹² As Bentham acknowledges: “this Liberty of yours is the work of Law. But then who are you in whom this Liberty is produced by it? The person on whom it acts? No, but the person on whom it prevents me from acting. Liberty then is not the direct work of law, but only the indirect.” Quoted in Douglas G. Long, *Bentham on Liberty: Bentham’s Idea of Liberty in Relation to His Utilitarianism*, University of Toronto Press (1977), at 78. This passage indicates that our eventual conclusion is in part an artefact of the relational aspect of liberty on which we have insisted.

¹³ Bentham, note 1, at 57.

¹⁴ Bentham, note 1, at 57, quoted with the parenthesis excluded in Pettit, note 8, at 39.

¹⁵ Pettit, note 8, at 39.

process by which the question of how public power is to be exercised - the second-order rules according to which the first-order rules are made - points the way forward for republican enquiry. In particular, the notion that private law redistributes freedom, based on a consideration of “coercion applicable by individual to individual,” is a promising insight in light of the concern we have identified for horizontal domination.

2.2.3 Bentham against liberty

Bentham’s claim must be understood in its context: a point-by-point rebuttal of the Declaration of Rights issued during the French Revolution. Article 2 of said declaration states that “The end in view of every political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security and resistance to oppression.”¹⁶ The pretended imprescriptibility of liberty is undermined to Bentham’s eyes by the fact that “all rights are made at the expense of liberty.”¹⁷ It is not that one law or another is a greater threat to liberty: by *reductio ad absurdum*, all are “repugnant to these natural and imprescriptible rights: consequently null and void; call for resistance and insurrection.”¹⁸ Bentham’s argument must therefore be understood for what it is: a diatribe not against law (as inherently reductive of liberty) but against the notion that liberty can remain intact in the presence of law. An argument against liberty, not law. On one hand, Bentham’s conclusions are thus a consequence of the liberal conception of freedom of which he was an adherent¹⁹ - if liberty is non-interference, then yes, it would seem true that all laws, even that against, for example, murder, reduce freedom. On the other, this conclusion is not problematic for Bentham, who subordinates freedom, as all else, to utility: the net result of the subtraction of one of humanity’s two great ‘sovereign masters,’ pain, from the other, pleasure: “It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne.”²⁰ We might replicate Bentham’s conclusion not by renouncing freedom but by reconceptualising it. We begin such a process through a

¹⁶ Quoted in Bentham, note 1, at 52.

¹⁷ Bentham, note 1, at 57.

¹⁸ Bentham, note 1, at 57.

¹⁹ “Personal liberty is accordingly either liberty of behaviour in general, or liberty of loco-motion. Liberty of behaviour is again either the absence of restraint or the absence of constraint.” Jeremy Bentham, *Force of A Law* (from *Of Laws in General*), in Bhikhu C. Parekh (ed.), *Bentham’s Political Thought*, Croom Helm Ltd (1973), at 176.

²⁰ Bentham, note 6, at 11.

consideration of the state of nature, which shows itself to be unintentionally revelatory of the problematic of neo-republican thought in its invitation to step back from the question of law to that of the organised public power which law directs. We here abandon the pretence that one can discuss law as a discrete phenomenon apart from the body of public power which it directs. When we discuss law, we take for granted the existence of that power: we must be explicit about *its* relation to freedom.

2.3 Hobbes's on the state of nature

We earlier noted that Quentin Skinner identified the emergence of the state of nature device in Hobbes' work with the eclipse of republican freedom. Here we appropriate it for our own purposes. Hobbes begins from a belief in the 'right of nature' as being "the Liberty each man hath, to use his own power, as he will himself, for the preservation of his own Nature; that is to say, of his own Life."²¹ He contrasts natural 'right', which "consisteth in liberty to do, or to forbear" with 'laws of nature' which "determineth, and bindeth to one of them"²² - as a result, "Law, and Right, differ as much, as Obligation, and Liberty; which in one and the same matter are inconsistent."²³ Law reduces freedom, but as a law of nature is "a Precept, or generall Rule, found out by Reason," it derives from the natural order and does not permit one human to reduce the liberty of others. Such laws of nature do not limit the right of man to that which is necessary for his own preservation, and he has as a result "a Right to every thing; even to one another's body,"²⁴ a situation in which "there can be no security to any man."²⁵

This is the famous 'state of nature' - man's 'natural condition,' in which no man is ever safe, even the weakest man having "strength enough to kill the strongest, either by secret machination or by confederacy with others."²⁶ Men quarrel - for gain, for safety, or for reputation - and in the absence of a common power, the situation is one of war. Not a contingent and temporary war, but a war "of every man, against every man," in which life is

²¹ Thomas Hobbes, *Leviathan*, in Richard Tuck (ed.), *Hobbes: Leviathan*, Cambridge University Press (2nd Edition) (1996), at 91

²² Hobbes, note 21, at 91.

²³ Hobbes, note 21, at 91.

²⁴ Hobbes, note 21, at 91.

²⁵ Hobbes, note 21, at 91.

²⁶ Hobbes, note 21, at 87.

“solitary, poore, nasty, brutish, and short.”²⁷ It is on this ground, a state of absolute freedom, that Hobbes constructs his Leviathan.²⁸

2.3.1 Constructing Leviathan

To achieve security, men contract with each other to form a sovereign power over themselves, giving up

“my Right of Governing my selfe, to this Man, or to this Assembly of men, on this condition, that thou give up thy Right to him, and Authorise all his Actions in like manner.”²⁹

This artificial person is the Commonwealth, of whose acts the contracting multitude,

“have made themselves everyone the Author, to the end he may use the strength and means of them all, as he shall think expedient for their Peace and Common Defence.”³⁰

The Commonwealth having been given existence, it makes laws of its own: these are “Artificiall Chains which men... have fastned at one end, to the lips of that Man, or Assembly, to whom they have given the Sovereigne Power, and at the other end, to their own Ears.”³¹ In civil society, freedom is to be found where the laws do not reach - there, “men have the Liberty, of doing what their own reason shall suggest, for the most profitable to themselves.”³² The “Liberty of a Subject lyeth therefore only in those things, which in regulating their actions, the sovereign hath praetermitted.”³³ The sovereign’s laws destroy the freedom of those who live under it. In the absence of the sovereign they were absolutely free; their freedom now exists only in the interstices of the laws it makes for them.

²⁷ Hobbes, note 21, at 88-9.

²⁸ Bentham’s position is similar: “As yet there is no law in the land. The legislator hath not yet entered upon his office. As yet he hath neither commanded nor prohibited any act. As yet all acts therefore are free: all persons as against the law are at liberty... Legal restraint, legal constraint and so forth are indeed unknown: but legal protection is unknown also” From *Of Laws In General*, quoted in Long, above, note 12, at 130.

²⁹ Hobbes, note 21, at 120.

³⁰ Hobbes, note 21, at 120.

³¹ Hobbes, note 21, at 147.

³² Hobbes, note 21, at 147.

³³ Hobbes, note 21, at 147.

2.3.2 Freedom and law in Hobbes

Those gaps as remain are wholly contingent: not only is the sovereign not bound by any higher law, it is not even bound by its own laws, for “having power to make, and repeale Lawes, he may when he pleaseth, free himself from that subjection, by repealing those Lawes that trouble him, and making of new; and consequently he was free before.”³⁴ The civil laws being nothing other than the sovereign’s commands, they can be no impediment to its will.³⁵

The natural liberty of man in the natural condition does not therefore survive the creation of the sovereign power, the purpose of whose laws is “Restraint; without the which there cannot possibly be any Peace... Law was brought into the world for nothing else, but to limit the naturall liberty of particular men, in such manner as they might not hurt, but assist one another.”³⁶ Hobbes’ civil laws are not subject to the limitations of neither private reason nor, contra Edward Coke, the ‘artificial perfection of reason’³⁷ embodied in common law and, in one of Coke’s less restrained moments declared to outrank legislative enactments.³⁸ Instead civil laws are limited only by the reason of the sovereign himself.³⁹ We therefore encounter in Hobbes an unambiguous prefiguring of the argument made by Bentham. Man is free in the absence of law; law is introduced for the express purpose of limiting that liberty; no limits exist on the laws which might be made by the unbounded sovereign to which men give up

³⁴ Hobbes, note 21, at 184. This goes some way to justifying the separation of executive and legislative power.

³⁵ For an overview of Hobbes’s legal thought, see M.M. Goldsmith, *Hobbes on Law*, in Tom Sorell (ed.) *The Cambridge Companion to Hobbes*, Cambridge University Press (1996), and the recent David Dyzenhaus and Thomas Poole (eds.), *Hobbes and the Law*, Cambridge University Press (2012).

³⁶ Hobbes, note 21, at 185. In his more materialist moments, Hobbes follows through the logic of his belief that unfreedom consists merely in physical impediment, claiming that even law does not truly inhibit liberty: “all actions which men doe in Common-wealths, for *feare* of the law, are actions, which the doers had liberty to omit.” (at 146). For a discussion of the ‘paradox’ of this position, see Quentin Skinner, *Liberty Before Liberalism*, Cambridge University Press (1997), at 6.

³⁷ Coke, *Institutes*, vol I, s. 138. Coke’s point here is at least in part a response to Cicero’s claim that “*lex est ratio summa, insita in natura*”: see Phillip Hamburger, *Law and Judicial Duty*, Harvard University Press (2008), at 129.

³⁸ Dr Bonham’s case (1610) 8 Co. Rep. 107a. This argument has re-surfaced in various forms as part of the movement designated broadly as ‘common law constitutionalism’ – see Thomas Poole, *Back to the Future? Unearthing the Theory of Common Law Constitutionalism*, (2003) 23 Oxford Journal of Legal Studies 435.

³⁹ Hobbes’s positivism is similarly derived from this relativistic conception of reason: “There is not amongst men a universal reason agreed upon in any nation, besides the reason of him that hath the sovereign power. Yet through his reason be but the reason of one man, yet it is set up to supply the place of that universal reason [...] and consequently our King is to us the legislator both of statute-law and of common-law.” Thomas Hobbes, *Dialogue between a Philosopher and a Student of the Common Law of England*, in Alan Cromartie and Quentin Skinner (eds.), *Thomas Hobbes: Writings on Common Law and Hereditary Right*, Oxford University Press (2005), at 34.

their freedom in return for security.⁴⁰ Most importantly, Hobbes reconnects the existence of positive laws to that of an apparatus of public power whose use is determined by law; all claims about freedom necessarily presuppose such apparatus and cannot convince without reference to it. This is not the specific Austinian claim that laws ‘properly so called’ are merely commands backed by sanctions, but the more general claim that there exists behind state legal systems a coercive apparatus which underpins it.

The state of nature device therefore serves to justify the absolute power of the sovereign, while its elevation to the highest state of human freedom leads to the move into civil society a lapsarian quality - the covenant between one and all is not the vindication of freedom but its subordination to the demands of security. When man is free he is not safe; when he is safe he is not free. Laws reduce freedom, which persists only where they do not reach. For the purposes of considering the relationship between law and freedom, however, the Hobbesian account is important, and to be privileged over any which blithely pronounces upon the question in very general terms - not for its conclusions, but because of the connection it makes between the effect of law upon freedom and the very existence of an organised public power. All accounts of law presuppose such an entity, but nothing useful can be said about law and freedom while it remains in the background.

2.4 A republican appropriation of the state of nature

The state of nature thought experiment portrays the fact of bare human plurality as a situation of perfect (vertical) freedom and concomitant absence of security. Substituting the neo-republican concern for domination (i.e., arbitrary interference) for that of interference simpliciter, the picture changes significantly. Consider again Hobbes’s description of the *bellum omnium contra omnes*. Here, the individual lives precariously. If he is weak, nothing protects him against the strong. Even he is strong, he must eventually let down his guard and when he does, his strength will not protect him. Though the economically strong may be able to arrange security, their material resources will be similarly threatened: they will not even be ‘owned’ in any sense we recognise. The claim that in the absence of some system of public power man is free does not convince. True, he does not find himself interfered with by the

⁴⁰ On this basis, Philip Pettit has suggested Hobbes’ social contract is a variant of the slave contract, by which the slave disposes of the property in his own body - Philip Pettit, *Liberty and Leviathan*, (2005) 5 Politics, Philosophy & Economics 131, at 136.

(non-existent) state: there is no vertical interference, or possibility of it. He does, however, live at the mercy of his fellow men, each of whom can interfere with him for any reason or for none. Interferences with his interests need not be frequent: Hobbesian presuppositions about the extent to which they would take place are irrelevant. It is enough that such interference *can* take place, there not existing any organised public power to prevent it. The state of nature, then, contra Hobbes, is not one of freedom, but the purest state of horizontal unfreedom - an absolute vulnerability to Pettit's *dominium*. The dawn of the state of nature device was central to the replacement of republican with liberal freedom, but there is no reason why republicanism should not push back; accept the state of nature as a useful counterfactual, but one which brings to light the weakness of the liberal ideal rather than secures its victory. The shift from liberal to republican freedom therefore turns on its head Hobbes' assessment of the state of nature.

A republican reconceptualisation of the issue sheds light not merely on the state of nature, in which there exists no organised public power, but on what is to be gained by instituting such a power. From a republican point of view, in 'moving' into civil society one does not renounce freedom, but instead alleviates a particular sort of unfreedom - the pure horizontal domination in which each individual finds him or herself open to the arbitrary interference of every other individual - by giving existence to a body capable of restraining that arbitrary interference and so rendering free those who would otherwise be unfree. How this would work is reasonably clear: a system of criminal law means that many of the most egregious interferences with others' involve pitting oneself against public power and so risking punishment. Not only are bodily interests protected, but so too are those in material goods, which necessitates a method of distinguishing between *meum* and *tuum*, which can in fact only exist as legal categories in the presence of an organised public power.⁴¹ The scope of arbitrary interference by parties horizontal to oneself is reduced and freedom accordingly increased. The institution of an organised public power and consequent inauguration of a vertical relationship is therefore uniquely capable of making the difference between the pure horizontal domination of the state of nature and a condition of freedom: seen in this light, we are not sacrificing freedom but making possible its achievement. Such reconceptualisation

⁴¹ Relevant here is Marx's rejoinder to the anarchist Proudhon's declaration that 'property is theft': "'theft' as a forcible violation of property presupposes the existence of property." Karl Marx, On *Proudhon*, a letter to J B Schweizer published in *Der Social-Demokrat*, No. 16, (February 1, 1865).

also provides significant guidance as to how the state's powers should be put to use: given the inescapable fact of human plurality, the coercive apparatus associated with public power should be instrumentalised so as to protect individuals against arbitrary interference by others.

2.4.1 Unfreedom and absolutism

The republican treatment of the state of nature not only rejects the claim that it is a state of freedom: it similarly calls into question the claim that in giving up that freedom one achieves security. The Commonwealth into which man contracts is, we have seen, unlimited in its legislative scope - the laws being nothing more than the sovereign's commands - and so Hobbes's Leviathan is not the antithesis of republican unfreedom, but another, altogether more pernicious source of the domination which renders unfree in the republican worldview. The arbitrary interference to which the individual is open in the absence of the sovereign is replaced by the arbitrary interference of a power which is not only limitless but which, by virtue of the coercive apparatus it controls in order to protect man from man, is capable of significantly more harmful interference. In endorsing absolutism, Hobbes exemplifies the opposite pole of the range of threats against which the individual must be protected and so exposes the neo-republican conception of the human predicament. In the absence of public power, each man lives at the mercy of every other and is for that reason unfree. That unfreedom justifies the institution of public power, but if it exists without limit then the new, vertical, relation which has been inaugurated is one of unfreedom; the trade of freedom for security reveals itself instead a trade of pure horizontal unfreedom for pure vertical unfreedom. Here we find the individual: trapped between the threats posed by those with whom he shares the world - necessarily, not contingently - and those constituted by the mechanisms whose existence is justified by the need to protect him against the former. The solution to this dilemma is to be found in a legal order which ensures that the existence of public power does not render those who live under it unfree. Republicans traditionally referred to this project as the construction of the empire of laws.

2.5 The empire of laws

The empire of laws ideal follows from the link between the freedom of men and that of states, where the free state is the empire of laws. This particular formulation is prominent in the

work of James Harrington, “the most penetrating and influential” of the English republicans.⁴² His *Commonwealth of Oceana* of 1656⁴³ “marks a moment of paradigmatic breakthrough, a major revision of English political theory and history in the light of concepts drawn from civic humanism and Machiavellian republicanism.”⁴⁴ In it Harrington gives a *de jure* definition of government, as understood by ‘ancient prudence’ and revived by Machiavelli, as “an art whereby a civil society of men is instituted and preserved, upon the foundation of common right or interest, or (to follow Aristotle and Livy) it is the empire of laws, and not of men.”⁴⁵ This is contrasted with the “empire of men and not of laws” (of which a monarchy is the central example) which exists where “the laws... are made according to the interest of a man, or of some few families.”⁴⁶ The invocation of Aristotle is a reference to his claims that “it is more proper that law should govern than any one of the citizens”; that those who hold supreme power should “be appointed to be only guardians, and the servants of the laws” and not its masters.⁴⁷ The negative aspect of the preference for laws over men can be briefly stated: to place the highest power in the hands of a man is to give it “to a wild beast, for such his appetites sometimes make him; for passion influences those who are in power, even the very best of men: for which reason law is reason without desire.”⁴⁸

2.5.1 Harrington versus Hobbes

In formulating the ideal, Harrington provides a clear retort to Hobbes’ on freedom. Indeed, much of *Oceana* is best understood as a more or less direct rejection of Hobbes’ thought and

⁴² Even though, the verdict continues, “in some respects his ideas were eccentric to the prevailing character of the movement.” Blair Worden, *English Republicanism*, in J. H. Burn and Mark Goldie (eds.), *The Cambridge History of Political Thought (1450-1700)*, at 444.

⁴³ James Harrington, *The Commonwealth of Oceana*, in J. G. A. Pocock (ed.), *Harrington: 'The Commonwealth of Oceana' and 'A System of Politics'*, Cambridge University Press (1992). This element of Harrington’s thought has been obscured, Lovett suggests, by the reputation given to him by Hume’s statement that Harrington “made property the foundation of all government.” David Hume, *Essays Moral, Political and Literary*, Liberty Fund (1987), at 33, cited in Frank Lovett, *Harrington’s Empire of Law*, (2012) 60 *Political Studies* 59, at 59.

⁴⁴ J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, Princeton University Press (1975), at 384.

⁴⁵ Harrington, note 43, at 8. The *de jure* definition is contrasted with the *de facto* definition advanced by ‘modern prudence’.

⁴⁶ Harrington, note 43, at 9.

⁴⁷ Aristotle, *The Politics*, 3:16.

⁴⁸ Hayek refers to “clear evidence that the modern use of the phrase ‘government by laws and not by men’ derives directly” from this passage, together with a claim, in Aristotle’s *Rhetoric*, that “well drawn laws should themselves define all the points they possibly can, and leave as few as possible to the decision of the judges [for] the decision of the lawgiver is not particular but prospective and general, whereas members of the assembly and the jury find it their duty to decide on definite cases brought before them.” The inclusion of this latter statement shifts the emphasis considerably in the direction of Hayek’s own interpretation of the rule of law. Friedrich Hayek, *The Constitution of Liberty*, Routledge (1960), at 145.

a corresponding promotion of the philosophy of Machiavelli, the neglect of whose work Harrington bemoaned.⁴⁹ Hobbes claimed that the liberty of the commonwealth “is the same with that which every man then should have, if there were no civil laws nor Commonwealth at all,” and that though it was

“written on the turrets of the city of Luca in great characters at this day, the word LIBERTAS; yet no man can thence infer that a particular man has more liberty or immunity from the service of the Commonwealth there than in Constantinople.”⁵⁰

The link between human freedom and that of the state was thus denied: freedom means to be left alone and no form of political organisation is inherently more likely leave men alone; we have already encountered such an argument in Berlin’s admission that negative liberty is no more likely to be secured in a democracy than in other kinds of polity.⁵¹ Harrington rejected this separation of the individual freedom from constitutional order, rejoining that “wheras the greatest *Basha* is a tenant, as well of his head as of his estate, at the will of his lord, the meanest *Lucchese* that has land, is a freeholder of both, and not to be controlled but by the law, and that framed by every private man to no other end (or they may thank themselves) than to protect the liberty of every private man, which by that means comes to be the liberty of the commonwealth.”⁵² The reference to the Basha’s head, Skinner clarifies, is that he is “liable to lose it as soon as he speaks or acts in such a way as to cause the sultan offence.”⁵³ Better to be a poor man in a free state, subject only to law, than a rich man in an unfree state where one lives at the mercy of the person or persons whose whims determine the content of one’s rights and duties. The empire of law, and thus freedom, requires that power be

⁴⁹ Blitzer attributes part of the disagreement between Harrington and Hobbes to a methodological divergence: the former employs an inductive empiricism, in contrast to Hobbes’ belief that “starting with a true principle, one can arrive at true conclusions simply by a logical process similar to that used in mathematics.” Charles Blitzer, *An Immortal Commonwealth: The Political Thought of James Harrington*, Yale University Press (1960), at 94. Alan Ryan disagrees, suggesting that what Hobbes in fact despised was “the habit of flaunting their historical erudition not to advance their understanding of their own age’s dilemmas, but to show off their learning.” Alan Ryan, *Hobbes’s Political Philosophy*, in Tom Sorell (ed.) *The Cambridge Companion to Hobbes*, Cambridge University Press (1996), at 214. See also, Worden, note 43, at 450. Pocock suggests that despite the differences between them, they were united by their common (sectarian) enemies. J.G.A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*, Princeton University Press (1975), at 397.

⁵⁰ Hobbes, note 21, at 149.

⁵¹ On William Paley’s expression of an equivalent viewpoint, see Skinner, note 36, at 80.

⁵² Harrington, note 43, at 20.

⁵³ Skinner, note 36 at 86.

exercised in accordance with a body of law to which all contribute, so that no individual is at the mercy of another's arbitrary will.

Harrington therefore distinguishes liberty *from* the laws with liberty *by* the laws, on the basis of the same non-domination understanding of freedom revived by the neo-republicans; in being at the mercy only of the law, the Lucchese depends on the will of no other man and is therefore qualitatively freer than his counterpart in Constantinople. He is free *by* the law, rather than from it, as where there is no law, or it does not reach him. Such freedom by the laws reflects the republican ideal and can, contra Hobbes, be achieved only in a free state. Only there is the fact of organized public power non-dominating and the purpose of the move from state of nature to civil society vindicated.⁵⁴ We have, therefore, two necessary conditions for republican freedom: some form of organized public power which is capable of restraining individuals, and a body of law which directs and limits the use of that power, so that it does not become coextensive with the caprice of some person or persons in whom sovereignty is invested. If it does then the achievement of horizontal freedom comes at the cost of vertical unfreedom.

2.5.2 Constructing the empire of laws

The 'empire of laws and not of men' is not a self-executing ideal and the manner in which it is translated into a set of institutional and constitutional requirements varies. We can exclude the crude reading whereby the ideal is achieved through the exclusion of human input in government: as Hobbes asks, "What man... believes the law can hurt him; that is, words, and paper...?"⁵⁵ Such interpretation is "a naïve illusion"⁵⁶ and if the empire of laws ideal is intended to preclude human input into either the formulation or the execution of law, Hobbes is correct to reject it. Harrington makes no such claim, accepting that a judge upon the bench is as "a gunner upon his platform is to his cannon."⁵⁷ The question of how the neo-republican ideal is translated into a program of constitutional design is the subject of chapter 7: here we

⁵⁴ See also Montesquieu, who holds the liberty of the citizen to consist in his security and so depend "principally on the goodness of the criminal laws." In a state with the best possible laws, "a man against whom proceedings had been brought and who was to be hung the next day, would be freer than is a pasha in Turkey." Montesquieu, *The Spirit of the Laws*, in Anne M. Cohler, Basia Carolyn Miller, Harold Samuel Stone, (eds.), *Montesquieu: The Spirit of the Laws*, Cambridge University Press (1989), at 188.

⁵⁵ Hobbes, note 21, at 471.

⁵⁶ Hobbes, note 21, at 471.

⁵⁷ Harrington, note 43, at 9.

examine only the outlines of Harrington's recommendations, in particular their dual institutional/constitutional dimension.

2.5.3 Law which tracks interests

We see firstly, in the requirement that the law be framed "by every private man," the republican demand that law track the interests of those who live under it: were the law the creation of only some of those who were to live under it - "the will of one man, as in an absolute, or from the will of a few men, as in a regulated monarchy" - it would not do so, and freedom by the law would be impossible, with those who were permitted to make no contribution dependent upon the will of those who were. Such is the situation is the empire of men, wherein laws "are made according to the interest of a man, or of som few familys."⁵⁸ Instead the interests of the multitude must be made present, for "the mover of the will is interest" and the empire of laws requires that the interest which moves the will be "the public interest (which is no other than common right and justice, excluding all partiality or privat interest)." Given the generality of the modern legal systems (i.e., in formal terms they apply equally to all within the relevant territory), this call for the law to be based on the interests of the many rather than the few adds up to a requirement for universal suffrage: "law must equally procede from... the will of the whole people, as in a commonwealth."⁵⁹ The empire of laws ideal incorporates a partial democratic imperative not present in Hobbes.

2.5.4 Harrington's institutions

If the many are to be accommodated in a manner which forces the law to track their interests, the institutional structure must make room for them. Harrington's does so in a version of the Polybian political 'mixarchy.'⁶⁰ The senate, "the debate of the commonwealth,"⁶¹ is to be populated by those chosen for their excellence as it "tendeth unto the advancement of the

⁵⁸ James Harrington, *Prerogative of Popular Government* [1656], Book 1, Chapter 2.

⁵⁹ Harrington, note 58, Book 2, Chapter 1. We re-encounter here the problem associated with Rousseau's claims regarding the general will, which is ambiguous as between the mere outcome of a democratic process and some transcendental unitary public interest not necessarily related to their individual wills. The neo-republican claim which will later be made, softens this difficulty via the substitution of a requirement that citizens' interests merely be 'tracked' by the law for that which requires it to 'procede from their wills'.

⁶⁰ For background, comparing the Polybian variant with that of other Greeks, see David E. Hahm, *The Mixed Constitution in Greek Thought*, in Ryan K. Balot (Ed.), *A Companion to Greek and Roman Political Thought*, Wiley-Blackwell (2000).

⁶¹ Harrington, note 43, at 23.

influence of their virtue or authority that leads the people.”⁶² The legislature is to be bicameral, with a second body alongside this first:

“as the council dividing consists of the wisdom of the commonwealth, so the assembly or council choosing should consist of the interest of the commonwealth. As the wisdom of the commonwealth is in the aristocracy, so the interests of the commonwealth is in the whole body of the people.”⁶³

The senate proposes, but the democratic assembly resolves, in line with Harrington’s analogy of the girls and the cake: “divide, says one to the other, and I will chuse; or let me divide, and you shall chuse.”⁶⁴ Together, they make up the legislature in the Commonwealth of Oceana. In this brief vignette, several constitutional ideals are represented: the separation of powers, the notion that different subsets of the population - the one, the few, the many - are suited to different tasks, the tendency towards tyranny of over-centralised power. It does not, however, seem impossible to reconcile this schema with the Hobbesian sovereign: Harrington here considers the composition of the body which speaks with the sovereign’s voice, and not what issues from it. Hobbes’ argument is not that the sort of constitutional scheme Harrington endorses is not desirable, merely that is irrelevant to the freedom of those who live under it.

2.5.5 Harrington’s constitutionalism

Harrington’s account does not differ from Hobbes merely in its institutional dimension, however: also relevant to the question of freedom is the requirement of what we might describe as legal primacy, or constitutionalism. Alongside the two assemblies, Harrington posits an executive power, in acceptance of Hobbes’s point that the law as enacted “is but words and paper without the hands and swords of men.”⁶⁵ The body in question must, crucially, be one which is limited by law, not outside it or excepted from its reach: “the liberty of a commonwealth consists in the empire of her laws, the absence wherof would

⁶² Harrington, note 43, at 23.

⁶³ Harrington, note 43, at 24.

⁶⁴ Harrington, note 43, at 24. The Senate, which debates, is to reflect the natural aristocracy whereby some men are the natural superiors of others in being elected; the Council, which resolves, is to be representative of the citizenry as a whole.

⁶⁵ Hobbes, note 21, at 471; Harrington, note 43, at 24.

betray her to the lust of tyrants.”⁶⁶ The executive branch cannot be unconstrained if freedom by law is to result:

“as the hand of the magistrate is the executive power of the law, so the head of the magistrate is answerable to the people, that his execution be according to the law... the hand or sword that executes the law is in it, and not above it.”⁶⁷

Hobbes could not countenance such a notion, having constructed his sovereign so as to make the idea of its limitation by law a logical impossibility: this error “because it setteth the laws above the sovereign, setteth also a judge above him, and a power to punish him; which is to make a new sovereign; and again for the same reason a third, to punish the second; and so continually, without end, to the confusion, and dissolution of the commonwealth.”⁶⁸ This recursion, however, is based upon Hobbes’ notion of a unitary and monolithic law-giving sovereign who in being subject to laws is subject only to himself and thus not fettered: this “is not subjection,” Hobbes states, “but freedom from the laws,”⁶⁹ and so the aim of limiting the sovereign through law lapses into incoherence.⁷⁰ Two requirements of the empire of law were identified through consideration of the state of nature motif: the existence of an apparatus of public power and the requirement of that it be exercised through law. On the basis of Harrington’s critique of Hobbes, we can add a third - the requirement that public institutions, like those they exist to protect, be subject to the laws. The requirements of a public power limited by law and a separation of power between different institutions can be seen to be intimately related: for the reasons Hobbes gives, it makes no sense to limit a public authority by law if the law is merely a reflection of that same authority’s will. A separation between executive and legislative power is therefore a necessary concomitant of limiting the executive through law. Hobbes’ insistence that the form of government is irrelevant to freedom is dually incorrect.

⁶⁶ Harrington, note 43, at 19-20.

⁶⁷ Harrington, note 43, at 25.

⁶⁸ Hobbes, note 21, at 224.

⁶⁹ Hobbes, note 21, at 224.

⁷⁰ This problem reoccurs in Austin as a result of his attempt to place sovereignty in the people yet define as the sovereign the person or persons who give commands obeyed by the majority. Hart comments: “the original clear image of a society divided into two segments: the sovereign free from legal limitation who gives orders, and the subjects who habitually obey, has given place to the blurred image of a society in which the majority obeys orders given by the majority or by all.” H.L.A. Hart, *The Concept of Law* (2nd ed.), Oxford University Press (1994), at 75.

The empire of laws renders free for the same reason that unfettered power renders unfree; where it exists, the arbitrary interference of the absolute sovereign does not. Hobbes, in defending absolutism, threatened to wash away this “antient prudence,” and one of Harrington’s chief aims is to defend the accumulated wisdom of the ancients against the Hobbesian onslaught.⁷¹ History has largely vindicated Harrington’s efforts in support of constitutionalism (in the sense of government limited by law) and in the specific form of the empire of laws ideal his argument has proven highly influential. Its influence can be clearly seen the work of John Adams, whose *Thoughts on Government*⁷² written in 1776 and designed to guide the drafting of the state constitutions even before the political form of the Union itself was settled, invokes the ideal as the essence of the republic: “there is no good government but what is republican... the very definition of a republic is ‘an empire of laws, and not of men.’”⁷³ Where Harrington’s empire of laws has a dual institutional/constitutional dimension, Adams emphasises the former. Like Harrington, he recommends the separation of powers on the basis that “a single assembly, possessed of all the powers of government, would make arbitrary laws for their own interest, execute all laws arbitrarily for their own interest, and adjudge all controversies in their own favour,” but adds to it a requirement that the legislature be bicameral.⁷⁴ This is indicative of changes in the background assumptions of political and legal thought in the century or so - punctuated by the Glorious revolution and the associated constitutional limitations placed upon the English Monarch - which separates Adams from Harrington. The former can take for granted the limitation of the government by law for which Harrington, writing at a time at which this question had formed the background to a recent civil war, had to militate.

⁷¹ James Cotton, *James Harrington and Thomas Hobbes*, (1981) 42 *Journal of the History of Ideas* 407, at 408. Seventeenth century absolutism in English political thought is exemplified by Robert Filmer, *Patriarcha*, in J.P. Sommerville (ed.), *Filmer: 'Patriarcha' and Other Writings*, Cambridge University Press (1991); James VI and I, *The Trew Law of Free Monarchies*, in J.P. Sommerville (ed.), *King James VI and I: Political Writings*, Cambridge University Press (1995). The best overview is in Glenn Burgess, *Absolute Monarchy and the Stuart Constitution*, Yale University Press (1996).

⁷² John Adams, *Thoughts on Government, Applicable to the Present State of the American Colonies*, in Charles Francis Adams (ed.), *The Works of John Adams, Second President of the United States: Volume 4*, Cambridge University Press (2011), at 194.

⁷³ Adams references “Sidney, Harrington, Locke, Milton, Nedham, Neville, Burnet, and Hoadly” as proving the truth of this statement, but “no small fortitude” is required in order to admit, in the company of Englishmen, to having read these writers. Adams, note 73, at 196.

⁷⁴ Adams, note 73, at 197.

2.5.6 Situating the empire of laws

The empire of laws therefore exists between the pure horizontal unfreedom of the state of nature and the pure vertical unfreedom of the absolutist state. The lawlessness of the state of nature is to be rejected, for if there is no law, it can found no empire. The unfettered power of a Divine Monarch or of a Hobbesian sovereign subverts the law, replacing it with the empire of men, the former in its most threatening form - the empire of a single man. The empire of laws is founded upon a division of powers (and the resulting checks and balances) as well as a requirement of legal authorisation and legal limitation, of which the separation of power is a *sine qua non*, which works towards republican freedom. Man cannot be free but in a free state; the free state is an empire of laws and not of men, because only there are individuals protected from the arbitrary interference of each other by a state apparatus willing and able to interfere and yet with that interference authorised and limited through a democratically legitimated body of law, ensuring that both horizontal and vertical interference is non-arbitrary. When it is appreciated that the relevant comparator for the empire of laws is not solely the absolutist state, but also, on the other hand, the state of nature, it becomes clear that its merit is two-fold: the achievement of the horizontal freedom which is absent in the state of nature, and of the vertical freedom which cannot exist in the absolutist state.

2.5.7 From the empire of laws to the rule of law

The ideal of the rule of law has achieved within liberal thought a status like that the empire of laws once occupied amongst republicans. The latter as discussed in Adams and Harrington seems over-determined. It reflects the major constitutional disputes of the time: distinct from the orthodoxy but nevertheless determined by it. In the transition from the empire of laws ideal to the modern rule of law, we begin to jettison the contingencies of the specific historical-constitutional context which informed those disputes (which is not to say that others do not replace them). Where the empire of law was cashed out as an institutional ideal, the rule of law presents itself as a universal, transferable ideal possessing a value worth insisting upon separately from, and achievable separately from, issues of constitutional design. Though not born into independence, the modern rule of law has found success because it is not tied to a specific institutional order. It is the distillation of an ideal which once belonged to the republican project, but evades some of its complexities - not because

they are no longer relevant but because at late stage in modern constitutional development it is assumed they can be taken for granted and, further, because the rule of law is thought to offer something of value even where they cannot.

2.6 The rule of law

Notwithstanding that the “apparent unanimity in support of the rule of law is a feat unparalleled in history”⁷⁵ the rule of law is a contested concept, potentially irretrievably indeterminate.⁷⁶ So much so that legal analysis might be more incisive without the intellectual and historical baggage which the concept brings with it, it perhaps having, Judith Shklar suggests, “become meaningless thanks to ideological abuse and general over-use.”⁷⁷ In what follows I consider Dicey’s account of the rule of law and suggest that what he offers is unduly constrained by his Anglo-centric jurisprudence and so of limited universalisable value. I examine certain ways of categorising the ideal and suggest that the very project of explaining how to achieve it makes sense only in the context of a debate which starts from the value it is intended to promote. That value is the protection of the individual from the evils of arbitrary power, and so the rule of law as it exists in contemporary discourse is a subset of the empire of laws ideal, adapted to the reality of constitutional heterogeneity and the globalisation of legal discourse.

2.6.1 Dicey’s rule of law

Dicey has a good claim to the status of father of the rule of law, but his description is amongst the most criticised - famously, as an “unfortunate outburst of Anglo-Saxon parochialism.”⁷⁸ It remains worthy of consideration, not only because Dicey gave us “the first prominent modern formulation and analysis of the rule of law in a liberal democratic system,”⁷⁹ but also because his ideal is attached to an actually-existing legal system and so

⁷⁵ Brian Z. Tamanaha, *On The Rule of Law: History, Politics, Theory*, Cambridge University Press (2004), at 3.

⁷⁶ Of particular interest is the treatment of the rule of law as an ‘essentially contested concept,’ in Jeremy Waldron, *Is the Rule of Law an Essentially Contested Concept (in Florida)?*, (2002) 21 Law and Philosophy 137. The phrase originates in W.B. Gallie, *Essentially Contested Concepts*, (1955-1956) Proceedings of the Aristotelian Society 56.

⁷⁷ Judith N. Shklar, *Political Theory and the Rule of Law*, in Allan C. Hutchinson and Patrick Monahan (Eds.), *The Rule of Law: Ideal or Ideology*, Carswell (1987) at 1.

⁷⁸ Shklar, note 77, at 26.

⁷⁹ Tamanaha, note 75, at 63

acts as a bridge between the (institutional) empire of laws ideal and later, free-standing accounts of the rule of law.⁸⁰

Dicey considered the rule of law to consist of three elements. Firstly, “no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in ordinary legal manner before the ordinary courts of the land. In this sense the rule of law is contrasted with every system of government based on the exercise by persons in authority of wide, arbitrary, or discretionary powers of constraint.”⁸¹ Secondly, “every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of ordinary tribunals,”⁸² and thirdly “the general principles of the constitution (as for example the right to personal liberty, or the right of public hearing) are with us the result of judicial decisions determining the rights of private persons in particular cases brought before the courts.”⁸³

The first aspect is intriguing. That a man might not be punished except “for a distinct breach of law established in ordinary legal manner before the ordinary courts of the land” is one thing; that this distinguishes the rule of law from “wide, arbitrary, or discretionary powers” is a very different claim. Leaving aside arguments based upon the inherent indeterminacy of law,⁸⁴ the procedural requirements seem less exacting than Dicey implies: law might meet his standard yet nevertheless give effect to wide or discretionary powers. This first aspect thus seems to marry formalism and substantivism in a not wholly coherent manner, whereby a procedural requirement somehow gives rise to certain substantive characteristics.⁸⁵ In reality,

⁸⁰ His account has been held untranslatable “not because his words are English but because the very thought being communicated is inextricably bound up with English institutions.” Harry W. Jones, *The Rule of Law and the Welfare State*, (1958) 58 Columbia Law Review 143, at 149.

⁸¹ A. V. Dicey, *Introduction to the Study of the Law of the Constitution*, (8th ed.) Liberty Fund (1982), at 110.

⁸² Dicey, note 81, at 114.

⁸³ Dicey, note 81, at 115.

⁸⁴ Legal indeterminacy is a key theme of the ‘movements’ known as legal realism and critical legal studies (CLS), though their explanations of it differ. Where realists focus on the inability of rules to determine specific outcomes, which remain underdetermined in the absence of some further consideration (which much realist thought was dedicated to identifying), CLS scholars “tended to locate the source of legal indeterminacy either... in general features of language itself, or... in conflicting moral and political principles that purportedly exist beneath the surface of the law.” Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, (1997) 76 Texas Law Review 267, at 274.

⁸⁵ Such an argument is deployed by Fuller in his *The Morality of Law*, Yale University Press (1974), but Fuller is more exacting in his formal standards, and the ‘leap’ he makes is therefore far less ambitious. Loughlin treats the marriage of the formal and substantive as part of an attempt by Dicey (‘whether conscious or not’) to bring together ancient and modern conceptions of the rule of law: “tradition and reason; artificial reason and will;

only the worst excesses of arbitrariness - where the legislature or courts are bypassed entirely, or some sort of ad hoc or personalised courts are employed instead - would be excluded by Dicey's demands. Wide powers are not logically excluded at all. From the opposite direction, Dicey's argument that "wherever there is discretion there is room for arbitrariness, and... discretionary authority on the part of the government must mean insecurity for legal freedom in the part of its subjects," too quickly concedes the impossibility of discretion that does not immediately dissolve into arbitrariness. When discretion is exercised in accordance with a pre-existing policy, to further the purpose for which it was granted, or in accordance with over-arching principles, then need not leave the 'room for arbitrariness' with which Dicey is concerned, and even if discretion could be excluded from all administrative decisions, it is unclear that this would be desirable.⁸⁶

This first claim goes hand in hand with Dicey's well-known distaste for administrative law, to which he devotes an entire chapter of his *Introduction to the Study of the Law of the Constitution* and the most important aspect of which he considers to be "the protection given in foreign countries to servants of the State... who, whilst acting in pursuance of official orders, or in the *bona fide* attempt to discharge official duties, are guilty of acts which in themselves are wrongful or unlawful."⁸⁷ This concern, and the opposition between the rule of law and the existence of administrative law, is similarly evident in the second claim. The idea that a special body of law or special courts might be employed to deal with 'vertical' relations is anathema to his sensibilities and, on his view, the English constitution. An ostensibly uncontroversial claim - that no man should be immune from the law nor otherwise privileged in its application⁸⁸ - becomes a highly tendentious argument about how to control public power, out of place among (admittedly, more modern) accounts of the rule of law, and seeming to justify the charge of parochialism.⁸⁹ Further, it is not at all clear that a separate

Coke and Hobbes; the modern institutional forms and the culture of the ancient constitution." Martin Loughlin, *Public Law and Political Theory*, Oxford University Press (1992), at 148-53.

⁸⁶ "Such a degree of inflexibility built into the system would make no allowance for the exceptional case calling for special treatment, which would itself be a source of injustice." Tom Bingham, *The Rule of Law*, Penguin Books (2010), at 50.

⁸⁷ Dicey, note 81, at 329.

⁸⁸ Dicey underlines that his claim is not the weaker one that "no man is above the law": note 81, at 193.

⁸⁹ Allan defends Dicey by suggesting that he, Dicey, makes no such distinction and that his claim is in fact the uncontroversial one noted. "What he opposed was the *exemption* of officials from the constraints of the ordinary law, which he took to be the chief characteristic of *droit administratif*." T.R.S. Allan, *Law Liberty, and Justice: The Legal Foundations of British Constitutionalism*, Oxford University press (1993), at 5. It is not at all clear that English law has ever entirely come to terms with the public/private distinction in a way which the

system of administrative law is necessarily such as to exempt men from the ordinary law of the land on the basis of ‘rank or condition.’ Two separate claims about equality before the law on one hand and equality of public and private parties before *a single body of law* on the other risk becoming confused.

It is in the third aspect that the peculiarity of Dicey’s understanding becomes most clear: in ascribing positive features of the constitution to the common law as opposed to legislative development, he makes an argument that does not, and often cannot, apply elsewhere. Beyond noting the empty self-congratulation of a common-lawyer in the face of his civil law rivals, it serves to recall that the rights afforded an ordinary Englishman by law in Dicey’s day were significantly fewer than those enjoyed by many of his foreign compatriots and those rights as were enjoyed were often instituted in a manner far removed from the common-law incrementalism whose virtues Dicey is extolling. It is therefore controversial to claim that the “general principles of the [United Kingdom] constitution” result from the common law: what of those rights embodied in, for example, Magna Carta or the Bill of Rights 1689? The argument is extended by noting where equal liberties are enjoyed their source is irrelevant, but that where the constitution starts from remedies (as in England), rights are likely to be more secure than where their protection begins with extended definitions that pay no heed to the need for remedies. Further, constitutional rights, being external to the ordinary operation of the law, may be suspended. Where they are part of the constitution because they make up part of the ordinary law, their suspension can take place by no means short of revolution.⁹⁰

2.6.2 The legacy Dicey’s rule of law

Dicey’s account of the rule of law bequeaths a mixed legacy if we seek general lessons. His normative claims are a mix of minimalist formalism and very broad (and correspondingly questionable) assertions about the implications of such formalism, while some of his conclusions seem unsupported by his evidence. He has constructed a causal connection between the English constitution (assumed to be good) and the English mode of protecting rights (similarly) where no such connection exists - or, better, where the connection is the result of historical contingencies that rob Dicey’s account of any universalisable value. The

abandonment of Dicey’s unitary perspective would seem to require. For an attempt, see the dicta of Laws J in *R v Somerset County Council, ex parte Fewings* [1995] 1 All ER 513, at 524.

⁹⁰ Dicey, note 81, at 197-202.

manifestations of the empire of laws ideal discussed above were judged unhelpful for being tied to specific institutional contexts. Dicey's ideal shows signs of breaking free from that institutional dimension and so giving birth to a rule of law ideal which is transferable, but hampers it by suggesting that its achievement is unique to the English context and counterposing it to an administrative state which would shortly outgrow the box into which Dicey tried to put it.⁹¹ Its contemporary success as a constitutional value has come at the cost of the abandonment of both claims: the rule of law is now everywhere, and wherever it does not already 'exist', there is someone who seeks to establish it.

2.7 Categorising accounts of the rule of law

The rule of law can be traced back to the same phrases in Aristotle as were cited by Harrington in relation to the empire of laws,⁹² though translated by Dicey into liberal-legalist terms suited to the concerns of the late-Victorian era. Most notably, the move away from institutional accounts evades the difficulty of explaining why the rule of law does not require a universal franchise. To go beyond Dicey, it helps to consider the different forms of rule of law account. One separates 'formal' and 'substantive', being defined by Paul Craig as follows:

"Formal conceptions of the rule of law address the manner in which the law was promulgated [but] do not however seek to pass judgment upon the actual content of the law itself... Those who espouse substantive conceptions of the rule of law seek to go beyond this... Certain substantive rights are said to be based on, or derived from, the rule of law. The concept is used as the foundation for these rights, which are then used to distinguish between "good" laws, which comply with such rights, and "bad" laws which do not."⁹³

⁹¹ If it had not already: see, e.g., *Cooper v. Wandsworth Board of Works* (1863) 143 ER 414 in which the court held the defendant to have failed to adhere to certain natural justice requirements, notwithstanding that they had no statutory basis. *Arlidge v. Local Government Board* *Local Government Board v. Arlidge* [1915] AC 120 (HL) signalled a retreat that was not to be reversed until Lord Reid's judicial review revolution of the 1960s.

⁹² Tamanaha, note 75, at 9.

⁹³ Paul Craig, *Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework*, [1997] Public Law 467, at 467.

This is paraphrased as the claim that “formal theories focus on the proper sources and form of legality, while substantive theories also include requirements about the content of the law,”⁹⁴ though even this ignores that the form of law and its source are very different topics. Brian Tamanaha, whose paraphrase this is, has subdivided each according to their specific requirements such that, for example, the ‘thinnest’ formal conception is that which merely requires that law is the instrument through which government acts, while at its ‘thickest’, the ideal requires that the content of the law in question be determined by the democratic will. Substantive varieties range from theories which incorporate fundamental individual rights to those which encompass a broad social welfare requirement of substantive equality and welfare rights.⁹⁵ Such a classification will have reasonably little difficulty in fitting most accounts of the rule of law into one or the other box, though it may be misleading: one of the most famous formal accounts is that of Lon Fuller, who emphasises that a series of merely formal requirements are demanded by the ‘inner morality’ of law.⁹⁶ The taxonomy, however, does nothing in itself to deepen our understanding of the rule of law: with it, we are no closer to identifying the essence of the ideal.

2.7.1 Why the rule of law?

Such classification is useful to the extent that it demonstrates the incommensurability of various accounts, but says nothing about what the rule of law is for. An analysis of the various rule of law accounts which starts not from its practical consequences - how is it cashed out in the context of an actually-existing legal system; what must we do to achieve it - but instead from the implicit or explicit purpose of the ideal will be at least as illuminating as an analysis in which that fact is treated as a secondary aspect, if it is considered at all. These formal and substantive requirements do not arise spontaneously, but in order to promote a good that must be made explicit. And if each of these sets of prescriptions is to genuinely represent a plausible conception of the same phenomenon - the rule of law - then each should be aimed at the same, or similar, ends. To start from the issue of what the rule of law is for is

⁹⁴ Tamanaha, note 75, at 9.

⁹⁵ Tamanaha, note 75, at 9.

⁹⁶ Fuller, note 85, generally, and chapter II in particular. Fuller’s argument is premised upon a view of law as having some minimum of purpose and being underpinned by a view of man as capable of becoming a responsible agent: law asks something of man, and can do so morally only where the law is framed so as to make it possible to comply.

to ensure that when the question of formal/substantive falls to be considered, we have an end against which to measure our preferred means.

This question provides the foundation for a second manner, suggested by Martin Krygier, of classifying rule of law accounts.⁹⁷ Krygier groups discussions of the rule of law according to their methodology, distinguishing those which are ‘anatomical’ from those which are ‘teleological.’ Approaches which are anatomical - Krygier identifies that of Dicey, alongside those of Hayek⁹⁸ and Fuller⁹⁹ - have two primary characteristics:

“first, their focus is on legal institutions and the norms and practices directly associated with them; second, a list of elements of such institutions and practices is presented as adding up to the rule of law.”¹⁰⁰

What is central here is how the rule of law is to be achieved, with the question of why it is that we might seek to achieve it taken for granted or glossed over. Attention is drawn instead to the practices and requirements of law. But, like the question of formal versus substantive conceptions (which can be seen to be a further subdivision of anatomical approaches) anatomical approaches generally are by definition secondary to and derivative of an understanding of why it is that we should want to protect the rule of law: the ‘how’ within the rule of law debate is not free-standing debate but lapses into incoherence in the absence of an prior ‘why.’ The incomplete theorisation of the rule of law therefore undermines the attempt to translate it into a normative programme. Disagreements as to what the rule of law requires might be accounted for by the fact that our different principles are in fact aiming at different ends and our shared label is of no consequence beyond its rhetorical value. We must understand why we want the rule of law - what it is that we aim to achieve through its institution - before we can have a meaningful discussion as to how we want to go about doing so.

⁹⁷ Martin Krygier, *The Rule of Law: Legality, Teleology, Sociology*, in Gianluigi Palombella and Neil Walker, (eds.), *Relocating the Rule of Law*, Hart Publishing (2009).

⁹⁸ Hayek, note 48.

⁹⁹ Fuller, note 85.

¹⁰⁰ Krygier, note 97, at 47-8.

2.7.2 The rule of law and the arbitrary exercise of power

In order to avoid the theoretical cul-de-sac into which we are led by attempts to flesh out a floating signifier of this sort, we can return to Krygier, who contrasts ‘anatomical’ approaches with those which are ‘teleological’. A teleological discussion is one which flips round the normal relation between how and why and attempts to give content to the signifier: it seeks to identify the value of the rule of law, either in isolation or as a prelude to an anatomical exercise of the sort described above. A teleological approach, in starting with the end or ends which the rule of law is intended to achieve, makes explicit that which is obscured or merely implicit elsewhere. The telos Krygier identifies as giving the rule of law its value, is “opposition to arbitrary exercise of power.”¹⁰¹ Krygier gives two reasons for which law should seek to exclude such power: “it is frightening, and... it is confusing.”¹⁰² The rule of law as contrasted with the fact of arbitrary power is not confined to its actual exercise. As with Pettit’s insistence that vulnerability to arbitrary power is itself an evil - even where the power is not being exercised - Krygier insists upon a “very general lesson, very old indeed”:

“if you want to avoid arbitrary exercise of power, don’t just trust to luck or virtue. When there is room for those with power to act repressively, they are sooner or later likely to. If you want to avoid it, something must be done and someone must be in a position to do it... the ability to restrain the ways in which power is exercised needs to be *institutionalised*.”¹⁰³

Although Krygier is correct to identify a methodological distinction within rule of law accounts, it should not be thought that the teleology of which he speaks is a contingent feature of those accounts, and that it remains possible to advance an argument about what the rule of law requires without some notion of what the rule of law is for. Krygier makes a case for function over form, but form demands function. Though it may be bundled together unhelpfully with the institutional recommendations which derive from it or merely left implicit, the teleology of the rule of law is ever-present, and everything ‘anatomical’ follows

¹⁰¹ Krygier, note 97, at 58.

¹⁰² Krygier, note 97, at 58.

¹⁰³ Krygier, note 97, at 59.

from it.¹⁰⁴ The seemingly essential contestability of the rule of law is a function of the extent to which, in putting forward anatomical descriptions of the concept, legal thinkers have lost sight of its underlying purpose.

2.7.3 Arbitrary power in rule of law scholarship

If we return, for example, to Dicey, we see that underlying at least part of his description of the rule of law is a value related to that which Krygier identifies. Its effect, Dicey tells us, is to ensure “the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and the existence of arbitrariness, of prerogative or even a wide discretionary authority on the part of the government.”¹⁰⁵ The exclusion of the arbitrary exercise of power is the key achievement of the rule of law. It is this point which has resonated in time and space - far beyond the contingencies of Dicey’s own context and into the administrative state whose growth he resisted - and which is frequently the only point of agreement amongst otherwise divergent accounts. It is present explicitly in Raz, who, however, considers the ability to guide behaviour the ‘virtue’ of the rule of law, holding that power can be arbitrary without its behaviour-guiding function being impaired and so sets a stricter standard than a general opposition to arbitrary power would suggest;¹⁰⁶ Friedrich Hayek, whose claim that the rule of law requires “the absence of legal privileges of particular people designated by authority, which safeguards that equality before the law which is the opposite of arbitrary government,”¹⁰⁷ is undermined by his belief that not just central economic planning but also the welfare state mean eventually that “somebody’s views will have to decide whose interests are more important; and these views must become part of the law of the land, a new distinction of rank which the coercive apparatus of government imposes upon people” - the law is reopened to status, therefore coercion, therefore ‘serfdom’;¹⁰⁸ and Timothy Endicott, who identifies three grounds on which law might be held to be arbitrary (if it “gives effect to the arbitrary will of the rulers,” if it “does not treat like cases alike,” and, if it is unpredictable - “if it does not tell its citizens where they stand”) eventually holding that the rule of law in the sense of the exclusion of arbitrary power, whilst

¹⁰⁴ See also Jeffrey Jowell, *The Rule of Law and its Underlying Values*, in Jeffrey Jowell and Dawn Oliver (eds.), *The Changing Constitution* (7th ed.), Oxford University Press (2011).

¹⁰⁵ Dicey, note 81, at 120.

¹⁰⁶ Joseph Raz, *The Rule of Law and Its Virtue*, (1977) 93 *Law Quarterly Review* 195.

¹⁰⁷ Friedrich A. Hayek, *The Road to Serfdom*, Routledge (2001), at 82.

¹⁰⁸ Hayek, note 107, at 82-5.

desirable, is impossible.¹⁰⁹ Such exclusion is the thread which runs through a series of otherwise disparate accounts, connecting it back to the republican empire of laws project. Some of the most prominent, of course, promote this telos without naming it (or perhaps without even being aware of doing so); others go far beyond what is self-evidently necessary and assimilate it with a particular political project.¹¹⁰

The rule of law works to protect the individual against arbitrary power - the same value which we have identified as being at the heart of the neo-republican revival and which was the focus of the classical republican attempts to construct an empire of laws.¹¹¹ Where Harrington and the English republicans, however, and Adams following them, were obliged to insist upon the institutional dimension of the empire of laws - the separation of power between institutions and, crucially, the inclusion of the mass of the people, later thinkers, writing when the age of absolutism had passed, have been able to take for granted some or all of those fundamentals and speak to the more technical elements of legal practice - so much so that the reason for which we insist upon the rule of law has become secondary within the discourse.¹¹² Now it is in the context of the complex administrative functions of the state and the apparatus by which they are pursued that the rule of law speaks loudest. This development - the shedding of the institutional dimension of the rule of law, notwithstanding that it has a vital role to play in the promotion of the underlying value we have identified for the project as a whole - has been so profound as to ground demands for the rule of law even where the other values of liberal-legalism are unceremoniously rejected.

¹⁰⁹ Timothy Endicott, *The Impossibility of the Rule of Law*, (1999) 19 Oxford Journal of Legal Studies 1. Such arbitrariness, he concludes, is unavoidable, due to the vagueness of language which transfers over into the law while the avoidance of vague terms would introduce a new arbitrariness, not reflecting the “reasons upon which such a law ought to be based.” (at 7-8).

¹¹⁰ For example, the so-called ‘World Bank’ conception of the rule of law, which aims to avoid the arbitrary exercise of power in ways – unpredictable judicial decision-making, unstable property rights etc – which will hinder economic growth and is by reputation less concerned with such power where it being used to secure social stability in the face of popular resistance to the growth agenda. For an overview, see Alvaro Santos, *The World Bank's Uses of the 'Rule of Law' Promise in Economic Development*, in David Trubek & Alvaro Santos (eds.), *The New Law And Economic Development: A Critical Appraisal*, Cambridge University Press (2006).

¹¹¹ See also Christian List, *Republican Freedom and the Rule of Law*, (2006) 5 Politics, Philosophy & Economics 201, noting that the republican conception of freedom builds in a rule of law ideal and so, in the inevitable trade-off between robustness and scope of freedom, republicans will probably favour the former (at 218).

¹¹² Protection against arbitrary power did not of course disappear from the political scene between Harrington and Dicey: it was an ‘eighteenth-century obsession’: see James T. Boulton, *Arbitrary Power: An Eighteenth-Century Obsession*, (1968) IX Studies in Burke and his Time 905.

This is demonstrated in the reflections offered by E.P. Thompson in his *Whigs and Hunters*, responding to the Marxist claim that, the law being merely “an instrument of the de facto ruling class,” the rule of law is “only another mask for the rule of a class” in which the revolutionary should take no interest.¹¹³ He disputes the claim to crude mystification made by those who critique law from the left: people “will not be mystified by the first man who puts on a wig” and so the law must “apply logical criteria with reference to standards of universality and equity.”¹¹⁴ If it does not, if it is “evidently partial and unjust”, then it will “mask nothing, legitimize nothing, contribute nothing to any class’s hegemony.”¹¹⁵ Even, then, where law acted in favour of the powerful against the powerless, for one class against the other, the law “mediated these class relations through legal forms, which imposed, again and again, inhibitions upon the actions of rulers.”¹¹⁶ From this we can conclude that:

“there is a very large difference, which twentieth-century experience ought to have made clear even to the most exalted thinker, between arbitrary extra-legal power and the rule of law.”¹¹⁷

This rule of law - the “inhibitions upon power imposed by law” - is for Thompson “a legacy as substantial as any handed down from the struggles of seventeenth century,” while the fact of “regulation and reconciliation of conflicts through the rule of law” is a “cultural achievement of universal significance.”¹¹⁸ Lest we fear that Thompson is ‘starry-eyed’ about this, he underlines that his claim is a minor, obvious one - that “there is a difference between arbitrary power and the rule of law” and that though “we ought to expose the shams and inequities which may be concealed beneath this law,” the rule of law ideal itself, the “imposing of effective inhibitions upon power and the defence of the citizen from power’s all-intrusive claims” is an “unqualified human good.”¹¹⁹ No matter what else might be true - particularly regarding the interests served by the law and the mode by which it is given content - we should prefer arbitrary power to be excluded by law.

¹¹³ E.P. Thompson, *Whigs and Hunters: The Origin of the Black Act*, Allen Lane (1975), at 265.

¹¹⁴ Thompson, note 113, at 264.

¹¹⁵ Thompson, note 113, at 264.

¹¹⁶ Thompson, note 113, at 265.

¹¹⁷ Thompson, note 113, at 265.

¹¹⁸ Thompson, note 113, at 265.

¹¹⁹ Thompson, note 113, at 266. It seems unlikely to be coincidental that Martin Krygier’s identification of the telos of the rule of law followed his earlier consideration of the concept in the context of Marxist thought: Martin Krygier, *Marxism and the Rule of Law: Reflections after the Collapse of Communism*, (1990) 15 *Law & Social Inquiry* 633, at 640-3.

This claim, modest compared to the proclamations of those who take a more orthodox liberal view of law, sparked considerable controversy.¹²⁰ Morton Horwitz's response is instructive:

“[The rule of law] undoubtedly restrains power, but it also prevents power's benevolent exercise. It creates formal equality - a not inconsiderable virtue - but it *promotes* substantive inequality by creating a consciousness that radically separates law from politics, means from ends, process from outcomes... it enables the shrewd, the calculating and the wealthy to manipulate its forms to their own advantage.”¹²¹

It is not the claim of this work that the achievement of the rule of law in the form of the exclusion of the capacity for public power to be exercised on an arbitrary basis will lead to progressive political outcomes, nor that it will work to the advantage of the disadvantaged. It is, however, its claim that in a condition of plurality, there exists a need for institutions through which public power can be exercised, and that in order for those made free by the institutions of government to remain free, the power which they exercise must be exercised in a non-arbitrary fashion; that is, through, and in a manner limited by, law. We can therefore side with Thompson, and designate the rule of law as a necessary - though by itself wholly insufficient - condition of republican freedom.

2.7.4 Republican freedom and the rule of law

The meaning Pettit gives to arbitrariness is quite particular - “chosen or rejected without reference to the interests, or opinions, of those affected”¹²² - such that non-arbitrariness from the republican perspective is both a more exacting standard than the merely ‘non-arbitrary’ of ordinary language might suggest and more precise than Harrington's implication that law is arbitrary if it does not ‘proceed from the will’ of all persons. The exercise of power without reference to the interests of those who live under it is indeed a key form of arbitrariness, but in a legal context, it is not the only one. Locke entangled it with another:

¹²⁰ See also Hugh Collins, *Marxism and Law*, Oxford University Press (1984), at 140-5.

¹²¹ Morton Horwitz, *The Rule of Law: An Unqualified Human Good?*, (1977) 86 Yale Law Journal 561, at 566.

¹²² Philip Pettit, *Republicanism: A Theory of Freedom and Government*, Oxford University Press (1999).

“As Usurpation is the exercise of Power, which another hath a Right to; so *Tyranny is the exercise of Power beyond Right*, which no Body can have a Right to. And this is making the use of the Power any one has in his hands; not for the good of those, who are under it, but for his own private, separate Advantage.”¹²³

Tocqueville similarly enmeshes the two, claiming that “A distinction must be drawn between tyranny and arbitrary power. Tyranny may be exercised by means of the law itself, and in that case it is not arbitrary; arbitrary exercise may be exercised for the public good, in which case it is not tyrannical. Tyranny usually employs arbitrary means, but if necessary it can do without them.”¹²⁴ In linking arbitrariness to the question of how the law is given specific content, Pettit has followed theorists of the rule of law in presupposing certain facts, central to the foregoing account, which make a similar contribution to protecting the individual against the existence of arbitrary power. The first is the very existence of an organised system of public power, without which the individual is unfree, albeit horizontally rather than vertically. The second is that the power exercised in the name of the public must be exercised through law; without legal basis it is, as Locke suggests, power without right, offending against the principle represented in the common law by *Entick v Carrington*, a principle whose application goes far beyond the rights of property to which Camden LJ originally tied it.¹²⁵ The third is that the law must apply to public authorities themselves. Power without lawful authority and power against law are inherently arbitrary; both are breaches of the rule of law ideal and an offence against republican freedom.

Pettit’s account of how law can be rendered non-arbitrary is procedural, and presupposes a generic formalist rule of law account if it is to not be wasted: that the law tracks the interests of those who live under its auspices means nothing - nothing at all - if in practice power is exercised without legal authority, or if the law does not bind public authorities themselves. He too risks losing sight of what is taken for granted in all this; of the many, preliminary

¹²³ John Locke, *Two Treatises on Government*, in Peter Laslett (ed.), *Locke: Two Treatises on Government*, Cambridge University Press, at 398-9.

¹²⁴ Alexis de Tocqueville, *Democracy in America*, Wordsworth (1998), at 102.

¹²⁵ 19 Howell’s State Trials 1029. The principle in *Entick* is not without ambiguity, and different approaches have been taken to the question of the need for public authorities to have explicit legal authorization for their actions: compare, for example, *Malone v Metropolitan Police Commissioner* [1979] Ch 344 with *R v Somerset County Council*, ex parte *Fewings* [1995] 1 All ER 513.

ways, in which the exercise of public power might be arbitrary. In either case, arbitrariness will result regardless of its content. Though it will not be subject to a full treatment in the present work, this indicates that one of the primary legal mechanisms through which republican freedom as non-domination will be protected is that which seeks to ensure that public power is exercised only with lawful authority: administrative law. It is clear, for example, that the ultra vires rule might be justified on such a basis; whether the other grounds of review known to the common law might similarly be justified is more difficult, though there is at least a prima facie case that challenges on the basis of due process and rationality are relevant to republican freedom. The question of whether or not these procedural and formal elements might not be augmented by substantive limits - whether or not there are certain things that public power cannot be capable of doing without exposing citizens to the threat of arbitrary power and so rendering them unfree¹²⁶ - will be considered in our third part.

2.8 Conclusion

In putting forward his own account of the rule of law, Lord Bingham describes a regime in which the rule of law is flouted. It is striking. Its hallmarks include:

“the midnight knock on the door, the sudden disappearance, the show trial, the subjection of prisoners to genetic experiment, the confession extracted by torture, the gulag and the concentration camp, the practice of genocide or ethnic cleansing, the waging of aggressive war.”¹²⁷

The argument of this chapter is at odds with this portrayal. Certainly, many of the events mentioned are indeed indicative of a violation of the rule of law. However, in focusing on the most egregious breaches of fundamental rights, likely to offend the sensibilities of any observer regardless of political orientation, there is the considerable risk of obscuring those breaches which have a more technical dimension and the resistance of which is wholly without glamour. The rule of law, like the empire of laws before it, promotes the republican

¹²⁶ The overlap of these procedural and substantive dimensions is encapsulated in the suggestions made by various members of the House of Lords in *Jackson v. Attorney General* [2005] UKHL 56 that there might exist a substantive (common law) right which prevents the deprivation of the substantive right to bring a challenge even on the formal grounds via an ouster clause or similar mechanism.

¹²⁷ Bingham, note 86, at 9.

ideal of freedom by guarding against arbitrary government action. Most such action lacks the visceral impact of the examples in Bingham's vignette. It is action that is arbitrary because not authorised by law; arbitrary because lacking a legally-appropriate justification, or otherwise unreasonable; arbitrary because in contravention of basic principles of justice without which arbitrariness is inevitable. A legal system which prevents such things can be endorsed quite apart from issues of constitutional design.

We started this chapter with an examination of Bentham's claim about the inherently freedom-reducing nature of law, looking at how the republican ideal of freedom legitimates the existence of the public power which law controls and how that power, must be exercised according to central standards - commonly described under the rubric of the rule of law - if it is not to institute a vertical relationship of domination. The move into civil society does not, however, put an end to horizontal unfreedom, of which the rule of law ideal as traditionally framed has nothing to say. We turn to it now.

Part 2 - Chapter 3: Private Unfreedom and Public Power

3.1 Horizontal unfreedom and public power

In the first section of this work, the neo-republican ideal of freedom as non-domination was described. A case was made for it on the basis, in particular, of its acknowledgment of the individual as necessarily embedded in a social context. This was pursued in chapter 2. It was shown that the neo-republican ideal rejects the claim that law is inherently reductive of freedom. We then reconsidered Hobbes' state of nature device. Where Hobbes saw a trade between freedom and security in the move into civil society, it was instead argued that he trades one form of unfreedom for another. The ideal which, in republican terms, justifies the existence of an organised public power - that of freedom as non-domination; protection against the arbitrary exercise of power - transpires to be identical with that which, in the form of the rule of law, lays down certain requirements as to the relationship between law and power, even prior to a consideration of the content of the law. The first of these is that there must exist a public power whose use law can govern.

The existence of an organised public power and associated coercive apparatus is justified by the possibility of horizontal domination in its absence. Its exercise through, and limitation by, law is a function of the vertical domination which would otherwise occur - which would result from an unlimited or unrestrained public power. In this second part, we explore the forms of horizontal domination which do not merely survive but are exacerbated by the apparatus of public power which exists ostensibly to protect man from man. With a view to producing a general theory of law and horizontal domination, we start by considering two challenges posed in the past to republican thought which take as their focus horizontal relationships. Each speaks to the nature and sources of unfreedom in modern society; together they point towards a republican constitutionalism which protects against both horizontal and vertical domination.

3.2 Slavery: the ideal type of horizontal unfreedom

We have distinguished between horizontal and vertical domination. The effect of each is to create what republican writers have referred to as a condition of slavery. The master-slave

relationship being invoked as the antithesis of republican freedom, of course, is a horizontal relationship. As the paradigmatic form of the relationship at issue in talk of horizontal domination, it is useful to consider the features of the relationship which we recognise, albeit in the form of a more or less pale reflection, elsewhere. The image is a powerful one, but to fully conflate chattel slavery with the unequal relationships which are the subject of this chapter is to undermine through exaggeration. Its rhetorical strength should not be abused.

In the master-slave relationship, the asymmetry of the relationship is everything. One party is privileged as the bearer of legal rights; the other their object. The master makes all decisions for the slave, acquiring and disposing of him or her at will, even gaining ownership of his or her offspring, while the moral and legal subjectivity of the slave is strangled. Deprived not merely of the ability to flourish as a human being but of the most fundamental autonomy, the slave knows the horror of being entirely dependent upon his master. This is true not only on the ordinary sense of the term, whereby the slave is reliant upon the master for food, shelter and other fundamentals of survival (handed over on the basis of a particularly cruel form of ‘enlightened’ self-interest, much as one might conduct repairs to protect the value of an important asset) but also in the republican sense, whereby any respite is illusory, the master possessing the ability to interfere arbitrarily with the interests of the slave.¹ This contingency is central. It will be remembered that the image of the slave with the benevolent master helped to distinguish liberal from republican freedom. That image must be borne in mind in the course of the discussion which follows. It is true of some of our examples that the fact of interference is intermittent and exceptional - even more so than in the case of the slave with the benevolent master. That the potential for arbitrary interference nevertheless persists is the basis on which verdicts of horizontal unfreedom - the claim that one party lives at the mercy of another - are arrived at.

¹ The slave also lacks, in the Hegelian account, the recognition of the master which would permit him to recognise himself as self-conscious; the master receives the recognition of the slave but, viewing the slave as his inferior, he does not thereby receive the recognition he himself desires and which is necessary for the consummation of inter-subjective identity: for his account of the dialectic of recognition between master and slave, see G.W.F. Hegel, *Phenomenology of Spirit*, Galaxy Books (1979), at 110-11.

3.2.1 Public power and private domination

In considering the many forms of horizontal domination, it is important to first distinguish the situation of chattel slavery (which we take as a model; an ideal type) from what we have called ‘pure’ horizontal domination - that of one man by another in the absence of an established public authority, such as would be a feature of a hypothesised state of nature. The legalised form of horizontal domination is both ‘better’ and ‘worse’ - each term of course bearing a sense suitably adapted to the context - than that which occurs in the absence of law and the state. Its impurity does not amount to a dilution; instead the mediation of the horizontal relationship by public power puts the coercive apparatus of the state at the service of man against man. Here, it is not sufficient for the slave to escape, as it might be were the slave’s status as such based merely upon physical force, for the reach of the master’s writ extends as far as that of the public power which will enforce his ‘rights’ over the slave. Worse also in that it demands not even the minimum of strength, cunning or effort that is required for one to domineer over another in the absence of the state. Finding the force of law behind them, the weak and foolish are just as capable of enslaving, and the fact of greater strength no longer serves to resist. The existence of public power therefore multiplies the dominion of master over slave, legitimating his personal interferences by giving them the force of law and offering him new modes of interfering. A prime example is found in the American Fugitive Slave Act of 1850 which required federal officials, even if located in states which themselves prohibited slavery, to nevertheless return runaway slaves to their masters. This law placed Northerners in a position where their own institutions and legal structures were used to protect the interests of Southern slaveholders.² No longer was it possible to take a passive approach to slavery: one was being compelled to actively maintain it. Where individual States attempted to resist that federal command, as did Wisconsin and Vermont, they withdrew their coercive apparatus and so limited the extent to which a slaveholder could expect public power to take his side in the dispute. Civil war soon followed. The existence of public power has not, therefore, put an end to horizontal unfreedom, but given it a new breadth and depth. And though public power extends the dominion over man, the fact of horizontal domination within a legal system means there exist some minimal limits on how horizontal power can be exercised: the master can use its coercive apparatus to

² A situation central to the plot of Harriet Beecher Stowe’s *Uncle Tom’s Cabin*, first published in 1852.

exercise interference of which he personally would not be capable but encounters that same apparatus when his own interferences take a form prohibited by law.³

Slavery, though a horizontal relationship, cannot exist in the absence of a public power which puts the coercive apparatus of the state at the disposal of master against slave. It is qualitatively different from a situation in which one party dominates another by virtue of physical capacity alone. Consequently, like all horizontal relationships of domination which are dependent upon the backing of public power (deployed according to law) to sustain them, it could have been and in fact was, abolished through law.⁴ The ability of the master to interfere and the correlative disability of the slave to resist were both artefacts of law. When the law no longer permits the relevant interference and permits to the slave the same power of resistance as any other person would enjoy - the right to meet force with force, without fear of encountering instead the power of the state - then arbitrary (freedom-reducing) interference involves infraction of the law. This account will inform all further analysis of those horizontal relationships of domination which subsist in the presence of law; which exist because the law permits them or sustains them and which, like slavery, will therefore be amenable (at least in part) to abolition by law.

3.3 Republicanism and feminism

It is from the master-slave relationship that we begin when discussing horizontal relationships of domination that have been, or might plausibly be, identified as worthy of attention within neo-republican scholarship, the relationship between master and slave demonstrating that many forms of horizontal domination do not exist in the interstices of the state but take it as

³ For an account of the outer limits of the slaveholder's lawful control over his slaves, see Thomas D. Morris, *Southern Slavery and the Law, 1619-1860*, University of North Carolina Press (1996), at 161-208.

⁴ In the United States abolition was effected by means of the Thirteenth Amendment, providing that "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." *Somerset's Case* (1772) 20 State Tr 1 suggested that slavery was no part of the English common law (though it is not clear that its legacy accords with what was in fact decided: see Jerome Nadelhaft, *The Somerset Case and Slavery: Myth, Reality, and Repercussions* (1966) *Journal of Negro History* 193). The Slave Trade Act of 1807 abolished "the African Slave Trade, and all and all manner of dealing and trading in the Purchase, Sale, Barter, or Transfer of Slaves, or of Persons intended to be sold, transferred, used, or dealt with as Slaves, practiced or carried on, in, at, to or from any Part of the Coast or Countries of Africa." The Slavery Abolition Act 1833 brought to an end, in stages, the institutions of slavery and indentured servitude themselves.

their sine qua non. Chattel slavery no longer exists in the majority of the world,⁵ and so we take the history of republican thought as a guide to areas of life in which less obvious domination might persist. One of these is relationships of domination in which the decisive factor is gender, and so we consider the relationship between republicanism and feminism.

Republicanism has frequently been condemned for its aristocratic nature: many forms of republicanism have been and continue to be either non-democratic or only contingently democratic.⁶ A broader perspective encourages the suspicion that such elitism exemplifies an omnipresent hypocrisy: almost every thinker we find extolling the virtues of republican freedom does so while assuming that such freedom could not possibly apply to a certain section of the population, whether slaves in ancient Greece or colonial America⁷ or the unpropertied or women in 17th century England.⁸ To deploy the ideal in the context of horizontal domination is impossible if this sort of discriminatory aspect is inherent within it. Freedom for the few that requires slavery, literal or metaphorical, for the many, is no freedom at all.

3.3.1 Feminism against republicanism

The critique of republican aristocratic exclusionism has found purchase within feminism, and it is clear that “[i]n its classical formulation, republicanism is far from woman-friendly.”⁹ Anne Phillips has suggested that republicanism in general is “ominously dismissive of femininity and women,”¹⁰ and takes as a specific exemplar of this Hannah Pitkin’s work on Machiavelli and her observations about the place of women in it: firstly, that “women scarcely appear in the political writings. They are almost entirely confined to Machiavelli’s

⁵ Slavery is prohibited by the 1948 Universal Declaration of Human Rights and the 1956 UN Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery and so chattel slavery is rare: public power does not often openly and explicitly enforce the ownership of one individual by another. Where slavery is extended to mean something like forced labour, then it becomes clear that true abolition remains a long way off, though accurate figures are difficult to come by, for obvious reasons, and estimates are often highly contested.

⁶ See, e.g., Samuel Dennis Glover, *The Putney Debates: Popular versus Elitist Republicanism*, (1999) Past and Present 47. The general theme of democracy in republicanism and neo-republicanism is considered in chapter 7, below.

⁷ Howard A. Ohline, *Republicanism and Slavery: Origins of the Three-fifths Clause in the United States Constitution*, (1979) 28 *The William and Mary Quarterly* 563.

⁸ E.g., Ellen Meiksins Wood, *Why It Matters*, 30 *London Review of Books* (25 September 2008)

⁹ Anne Phillips, *Feminism and Republicanism: Is This a Plausible Alliance?* (2000) 8 *Journal of Political Philosophy* 279, at 279

¹⁰ Anne Phillips, *Engendering Democracy*, Pennsylvania State University Press (1991), at 46.

plays and poetry, depicting private life or fantasy worlds,”¹¹ but also that “nothing is more striking in Machiavelli’s explicit remarks on women than his contempt for the ‘weaker sex’.”¹² Women “are somehow simultaneously both virginal or chaste and passionate or potentially capable of sexual abandon...They are objects of men’s desire, conquest, or of possession.”¹³ No matter how difficult the task of effecting a reconciliation between feminism and a republicanism that has neglected, or demonstrated an active hostility towards, women, it remains possible so long as Machiavelli’s misogyny is a companion to rather than a result of his republican predilections or, alternatively, the causal connection between republicanism and misogyny is broken in replacing the many historical republicanism with the singular form of the neo-republican movement. This would seem to be the case: in the *Discourses on Livy*, his most obviously republican work, women are mostly absent rather than disparaged and their most prominent appearance, in the claim that that “women have been the cause of many downfalls, and have done great damage to those who govern a city, and have caused many divisions”¹⁴ relates not to their own misdeeds, but to the misdeeds of men against them: the problems in his treatment of women do not flow directly from his republicanism. That correlation does not demonstrate causation is, however, insufficient ground for obscuring said correlation, and Machiavelli is not alone among republicans in having an attitude towards women which makes their neglect the better of the available options. It seems fair to agree that republicanism has never offered the most promising foundations on which to attempt to advance the position of women in society.

3.3.2 Feminism against non-domination

The general relationship between the many republicanism and feminism is less important than is the application of the neo-republican ideal of non-domination to the position of women within society. Given that here many of republicanism’s most problematic features - “masculine images of democratic participation and public activism,”¹⁵ culminating in a belief that the individual should be ready and willing to take up arms for his (always *his*) country -

¹¹ Hanna Pitkin, *Fortune Is A Woman: Gender and Politics in the Thought of Niccolò Machiavelli*, University of California Press, (1992), at 109.

¹² Pitkin, note 11, at 109, cited in Phillips, note 10, at 46.

¹³ Pitkin, note 11, at, 111.

¹⁴ Machiavelli, *Discourses on Livy*, (Trans. Julia Conaway Bondanella and Peter Bondanella), Oxford University Press (1997), at 319.

¹⁵ Philip Pettit, *Republicanism: A Theory of Freedom and Government*, Oxford University Press (1997), at 140.

are absent, the relationship is immediately less tense. But the non-domination ideal's historical career is tied up with this exclusionism, and so has been similarly deficient in the case of women as have other republican variants. Patricia Springborg has highlighted the patriarchal tendencies of republican thought through the work of proto-feminist thinkers who "had no compunction about exposing as a sham the pretence to freedom from domination as a universal ideal in states which institutionally excluded half of humankind."¹⁶ She argues that the distinction between liberal and republican conceptions of freedom would seem to be overstated when one considers that historically neither was concerned by the systematic unfreedom of womankind:

"Hobbes and Locke, by construing the public/private distinction as zones of freedom and unfreedom, ruled out freedom and rights in the household. Women, and particularly married women, were seen as 'natural slaves', a condition to which they were consigned by liberals and republicans alike."¹⁷

Women are dually excluded if republican thought is seen in this light: the majority by reason of belonging to the section of the population for which aristocratic variants of republicanism show no regard; the 'fortunate' few by reason of legal subordination to their husbands. If not caught at the first sift, most would be at the second. We are put on warning of a dual possibility of differential enjoyment of freedom: that between women and men, which is a form of domination with potential basis in both law and nature, and that between men and single women on one hand and married women on the other. Marriage being a legal institution, the latter is a differential which must exist primarily as a function of the legal rules in place. We see that the issue of gender domination, like the issue of slavery, likely implicates contingent legal rules, both at the level at which civil rights battles have been fought and won (such as the scope of the franchise) and at the level, more mundane but just as crucial, of family law.

¹⁶ Patricia Springborg, *Republicanism, Freedom from Domination, and the Cambridge Contextual Historians*, (2001) 49 *Political Studies* 851, at 855.

¹⁷ Springborg, note 16, at 855.

3.3.3 Mary Astell

To make good on the deficit of freedom in respect of women was a challenge which even the most populist republicanism of the times could not meet. Even an unusually democratic republicanism made no room for them. This was inconsistent with the logic of non-domination - as Mary Astell, the proto-feminist on whom Springborg places the greatest emphasis, famously asked,

“If all Men are born free, how is it that all Women are born Slaves? As they must be if the being subjected to the inconstant, uncertain, unknown, arbitrary Will of Men, be the perfect Condition of Slavery.”¹⁸

The republican ideal, and the recurring image of slavery, here provides a counter to the claim of freedom associated with liberal thought, almost a century before Wollstonecraft stated that of the history of women it was sufficient to know “that she has always been either a slave or a despot... and.. that each of these situations equally retards the progress of reason.”¹⁹ Astell’s argument, chiefly against Locke, proceeds through a consideration of the analogy between sovereign and paterfamilias from which, in Filmer, her argument stands twice-removed. Where Locke had laid the foundations of a philosophy of limited government by rejecting Filmer’s identification of sovereign with father, he had nevertheless made sure to distinguish the power of “a Magistrate over a Subject” - political power - from that of “a Father over his Children, a Master over his Servant, a Husband over his Wife, and a Lord over his Slave.”²⁰ Wives owe their husbands subjection; husbands have a ‘conjugal power’ over wives, “to order the things of private Concernment in his Family... and to have his Will take place before that of his wife in all things of their common Concernment.”²¹ That his conjugal

¹⁸ Mary Astell, *Preface to Reflections upon Marriage*, in Patricia Springborg (ed.) *Political Writings*, Cambridge University Press (1997), at 18. Springborg suggests that the use of ‘slavery’ must be ironic, not least because Astell rejected the Lockean insistence upon self-ownership and (so Astell claims) the right to real property which follows from it.

¹⁹ Mary Wollstonecraft, *A Vindication of the Rights of Women*, in Janet Todd (ed.), *Mary Wollstonecraft: A Vindication of the Rights of Woman and A Vindication of the Rights of Men*, Oxford University Press (1993), at 124. The image of women’s situation of slavery recurs frequently in Wollstonecraft: like soldiers, women are “thrown out of a useful station by the unnatural distinctions established in civilized life,” with idleness having “produced a mixture of gallantry and despotism in society, which leads the very men who are the slaves of their mistresses, to tyrannize over their sisters, wives, and daughters” (at 90).

²⁰ John Locke, *Two Treatises on Government*, in Peter Laslett (ed.), *Locke: Two Treatises on Government*, Cambridge University Press (1988), at 268.

²¹ Locke, note 20, at 174.

power is not political power - that the husband has no power of life or death over her - is scant consolation.²² Locke's interest is only that the divinely-willed subjection of Eve to Adam does not, contra Filmer, found a Monarchical power which requires Eve and her heirs to be permanently subject to Adam and his, the Divine Monarchs.²³ Astell has little patience for these distinctions between actors, and their effect of discriminating between men in their political existence and women in their 'private' one. Locke and his fellow liberal constitutionalists are upbraided for their inconsistency:

“is it not then partial in Men to the last degree to contend for, and practise, the Arbitrary Dominion in their Families which they abhor and exclaim against in the State? For if Arbitrary power is evil in itself, and an improper Method of Governing Rational and Free Agents, it ought not to Practis'd anywhere.”²⁴

Those who rejected the right of a single tyrant on a throne nevertheless countenanced the existence of tens of thousands of such tyrants, defined as by their own standard, in every household in the land. The 'Reflections upon Marriage', the “first articulated critique of the analogue between the marriage contract and the social contract on which early modern natural theories so depend,”²⁵ is therefore also a critique of the partial application of a normative standard of freedom. Notwithstanding the supposed natural condition of freedom, the laws placed half of the population in a situation of vulnerability to the arbitrary exercise of power. Men achieved freedom, but condemned women to unfreedom. The various conceptions of liberty, “whether articulated by Hobbesian absolutists, Filmerian patriarchalists, Lockean liberals, Miltonian democrats or Harringtonian republicans” did not imply radical change in society: in fact, each “left everything more or less as it was.”²⁶ The same state of nature device which Skinner considers to have obscured republican liberty acted to historicise “the distinction between the law of nature and the law of nations,” effectively constituting the state as:

²² Locke, note 20, at 174.

²³ Locke, note 20, at 174.

²⁴ Astell, note 18, at 17.

²⁵ Patricia Springborg, *Notes on the Text*, in Springborg, note 18, at 4.

²⁶ Patricia Springborg, *Mary Astell: Theorist of Freedom from Domination*, Cambridge University Press (1995), at 213.

“a mythical public sphere in which the writ of natural law still ran, and where men were free and equal creatures, while allowing the arbitrary inequalities of *ius gentium*, or statutory law, to flourish unabated in the private sphere.”²⁷

3.3.4 Forms of gendered domination

Though we take our lead from Astell, we must be more precise in identifying the phenomenon at issue here. There are three forms of gendered domination we might want to distinguish. The first is the domination of individual females by individual males - a personal relationship of domination, of the sort created by a contract of marriage at the time Astell was writing, with marriage effectively rendering the relationship between man and wife one of domination. The second is the domination of women as a gender by the state, whether or not it subsists on equal terms to that of men. If it does - because, for example, power is exercised either without legal basis or in a way which fails to track the interests of those who live under it - there is nothing to distinguish it from the general vertical domination by the state. If it does not - if it is domination of women, but not of men by the state because, for example, the franchise is denied to women - it is likely to appear, at first glance, similar to the third form of domination, that of women as a group by men as a group. If we assume the political community to be composed of men and women in roughly equal proportions, it is tempting to conflate one with the other. The effect is superficially similar: one half of the demos is systematically degraded in its position while the basis of the distinction - gender - is identical in each case. Nevertheless, for the reason given above, it is important to maintain the distinction: by inserting public power between the dominating party (men) and the dominated one (women), the strength of the domination is multiplied even if its domain is truncated. The sort of horizontal gendered domination which might occur in the state of nature (or wherever else the absence/failure of public power is such as to leave open the possibility of one section of society dominating another) is, again, both ‘better’ and ‘worse’ than is that which is possible where the domination is mediated by public power. In such a situation, the differential treatment in question can be formalised by law and enforced by the coercive apparatus of the state.

²⁷ Springborg, note 26, at 231-2.

3.3.5 The lowest common denominator

At first sight, then, we find the application of the non-domination ideal to the circumstances of women an appealing example of the ideal employed correctly. The potential use of Astell's work to redeem republicanism - incorporating her critique of liberalism within it and thereby claiming her for the republican tradition - is, however, hampered by the fact that, though Astell's criticisms were aimed at the emerging liberalism of the late 17th century, she argued not for a republican alternative, but for the superiority of monarchy: "[n]ot only was Astell not a republican but an out-and-out royalist, but she was not a rights theorist either" and attempts to claim her for either the republican or human rights traditions misidentify values which are in fact "the diffusion of Renaissance classical humanism."²⁸ Astell was a High Church Tory,²⁹ for whom the attraction of monarchy was that it secured the freedom of women from men: "In bypassing the political contract made by men, Astell at once invoked the earlier doctrine of the divine right of monarchs over all subjects alike and... denied the power of all men over all women."³⁰ Men could not dominate women if one and all were dominated on equal terms by a monarch chosen by God. Similarly, the 'contract' of marriage gives rise to a relationship which civil authorities have no power to create: "[t]he power to authorise marriage, like the power to authorize a sovereign, is in her view a power assigned only to God."³¹

While Astell's anti-liberal rhetoric is strongly reminiscent of modern republican arguments, then, her work is at cross-purposes with it, for the republicanism available to her was no better than its liberal competitor in securing the freedom of women from the domination of men, even she had not regarded it as "a species of heresy."³² Non-interference applied only to the public realm; non-domination only to men. In such a context, returning to the lowest common denominator was rational, if doing so was the only way to resolve the disparity. But the history of progressive female emancipation demonstrates that there exists a solution which does not require the sacrifice of the ideal to an imperfect solution: the second type of

²⁸ Springborg, note 26, at 5.

²⁹ The term "referring to that group within the Church of England that stressed its historical continuity with the Catholic Church, placing great importance on the authority of the church, the claims of the episcopate, and the nature of the Sacraments." Springborg, note 26, at 37.

³⁰ Ruth Perry, *Mary Astell and the Feminist Critique of Possessive Individualism*, (1990) 23 *Eighteenth-Century Studies* 444, at 452.

³¹ Springborg, note 26, at 14.

³² Springborg, note 26, at 211.

domination described above has largely disappeared not by increasing the arbitrariness of governmental power as it applies to men but by a series of reforms aimed at including women in the democratic process and thereby promoting the exercise of public power in a manner which suitably tracks their interests. Similarly, in the case of horizontal domination, we observe that the reconfiguration of the relative rights and obligations of man and woman can provide a solution which diminishes the unfreedom of women rather than merely diluting the freedom of all.

3.4 Neo-republican redemption?

Neo-republicanism speaks specifically to historically dominated groups. Pettit not only sees no conflict between republican and feminist ideals, but suggests that the former subsumes the latter into a larger project:

“if the main problem for women is that cultural, legal, and institutional pressures combine to... place them under the thumb of men - then the ideal for women is precisely that of being secured against arbitrary interference.”³³

He refers to Astell’s famous question as proof of “the appeal of non-domination as a feminist ideal” and traces it through Wollstonecraft and Mill (“No slave is a slave to the same lengths, and in so full a sense of the word, as a wife is”) into modern thought.³⁴ Elsewhere, the central ideal of neo-republicanism incorporates past republican concerns under its own rubric; here its use as our normative lodestar permits us to incorporate concerns and themes to which republicanism was historically hostile. So “[n]ot only can republicanism offer a persuasive articulation of the central feminist claims” but this ideal, Pettit claims, is one which “has had a continuous history within the ranks of feminists themselves.”³⁵ The effect is to reconceive the feminist project as an applied republicanism: though enjoying a distinct history, it is continuous with the larger neo-republican project. Pettit openly admits, however, that “[t]here is much to be done on this front. Whatever the progress made in modern states, women still

³³ Pettit, note 15, at 139.

³⁴ Pettit, note 15, at 139.

³⁵ Pettit, note 15, at 140.

have to endure a special vulnerability in many homes, in various workplaces, and on the streets of different cities.”³⁶

Conflicting assessments of this application of the non-domination ideal to the status of women are offered by Marilyn Friedman³⁷ and Nancy Hirschmann.³⁸ The former suggests that the ideal is too broad insofar as it would seem to characterise the mother-child relationship as one of domination - though legal rules circumscribe the mother’s scope for interference with her children - and the latter that it is overly focused on individuals and therefore fails to capture forms of potential interference not capable of being attributed to a particular agent.³⁹ The present work, as will be understood from the discussion above, is wholly cognisant of those forms of domination which are not reducible to individuals but instead occur in the relation between groups of actors, while nevertheless endorsing the use of the freedom as non-domination ideal in this context. Though the neo-republican project has demonstrated an ironically imperialistic tendency, it is important to leave intact what it finds here: its ideal, if it is part of feminist thought, must be understood as exactly that - a part, rather than the whole, or even its core.

Neo-republicans having accepted this application of their project, it seems strange that the topic of gender domination has remained a minor neo-republican concern. Though Pettit’s claim that “Even while freedom as non-domination looked accessible only to males, it held out a prospect that made sense also for females”⁴⁰ may well be true (though it would be better phrased as a hypothetical: women were largely excluded not just from the ideal, but also from the discussions of it), it is hardly sufficient to address the historical shortcomings of the tradition. That the logic was always present means little if assumptions about the world to which it was applied and the attitude of those who relied upon it were such as to contradict the logic. It does, however, provide the opportunity for neo-republicanism to learn from the mistakes of its forbearers, and follow its own logic through to the (belated) conclusion that “There is... something awry in an arrangement that saves men from a dominated status, and

³⁶ Pettit, note 15, at 140.

³⁷ Marian Friedman, *Pettit's Civic Republicanism and Male Domination*, in Cecile Laborde and John Maynor (eds.) *Republicanism and Political Theory*, Wiley-Blackwell (2008).

³⁸ Nancy Hirschmann, *The Subject of Liberty: Toward a Feminist Theory of Freedom*, Princeton University Press (2002).

³⁹ For discussion and critique of the two positions, see Maria Victoria Costa, *Is Neo-Republicanism Bad for Women?*, *Hypatia* (forthcoming, 2013).

⁴⁰ Pettit, note 15, at 139.

that represents that status as degraded and demeaning, while exposing women to precisely that sort of standing in relation to men.”⁴¹ This conclusion can be endorsed in its generality even if its understated tone suggests a lingering reluctance to learn the lesson being stated. Does not a ‘special vulnerability’ such as Pettit describes imply a special urgency with regard to the factors which give rise to domination where the only meaningful difference between dominating and dominated parties is gender? If this question is answered in the affirmative - as it is submitted it must be - then feminist preoccupations move to the centre of neo-republican attempts at reducing domination.

Another aspect of the neo-republican project is likely to diminish the utility of its application to feminism: its inheritance of the liberal presupposition that freedom is threatened principally by the state. No longer is the principal source of gendered domination the systematic exclusion of women from the political process, even if imbalances in political representation remain.⁴² When it was, when women were excluded from the vote or offered it on different terms to their male counterparts, the primary form of gendered domination was vertical: the exercise of public power was systematically biased towards the interest of men, and its exercise on women could not be other than arbitrary. It is this form of unfreedom at which suffragette struggles were most directly oriented. However, this vertical domination was accompanied by an intermediate layer, largely contingent upon it, of horizontal domination: when Astell was writing about the unfreedom of women it was not as related to the state but to their husbands and the heads of their households, a form of unfreedom qualitatively distinct from that of those, for example, imprisoned by the state without legal authority. Pettit is therefore correct to refer to homes, places of work and the street as sites of domination, but wrong in his failure to distinguish unfreedom by law with unfreedom against law; relationships of domination which the law supports from those which involve infraction of the law. As with legalised slavery, we retain a special concern for the capacity for arbitrary interference which is dependent upon the public power law directs. Such capacity is not directly removed merely by the expansion of the franchise so as to allow female participation in the political process: this is a longer and harder process which carries on long beyond the victory that starts it.

⁴¹ Pettit, note 15, at 139.

⁴² The Qualification of Women Act 1918 began the process of putting in place equal suffrage rights for women. The process was completed by the Representation of the People Act 1928. At the time of writing, women hold 146 of 650 seats in Parliament.

3.4.1 Pure gender-based horizontal domination

It is not difficult to see how the absence or failure of public power implies the ‘pure’ domination of the female gender; how, when there is no public power standing between private actors, women are frequently subject to the arbitrary interference with their interests by men. The very existence of public power is justified in the first place by the fact that in its absence, one encounters a situation of pervasive domination. On that basis, it should be clear that where conviction rates for sexual offences remain absurdly low;⁴³ where sexual crime frequently goes unreported;⁴⁴ where women live at the mercy of men, then public power has failed. The arbitrary interferences in question involve breaking the law - pitting oneself against organised public power - only in some abstract, theoretical sense: in practice, they happen so regularly, and with so few consequences, that those who interfere might be said to do so at their pleasure. This is not a state of nature in which the ability of one to dominate another results from the absence of any public power which might prevent it, but the effect is largely the same; women nevertheless live at the mercy of men. Nevertheless, our focus herein is on that domination which takes place with the tacit consent or active backing of public power, and so no more will be said on the topic.

3.4.2 Public and private in (feminist) republicanism

The argument that neo-republicanism must overcome the limitations it places on itself via its assumptions about the direction of dominating relationships echoes feminist concerns as to the hidden domination of woman in society notwithstanding the formal legal equality they have (largely) achieved and so “to the extent that [republicanism] conceives of independence as a political - rather than social or economic - condition, it is also out of tune with many later [feminist] preoccupations.”⁴⁵ Much such hidden domination is achieved through the

⁴³ Though lower than for all other categories of offence, conviction rates for sexual offences are higher than generally believed: Ministry of Justice statistics for England and Wales in the 12 months ending March 2012 show 5,951 convictions out of 9,849, giving a conviction rate of 60.4%. The Stern Review of 2010 (into “how rape complaints are handled by public authorities in England and Wales”) noted that the commonly cited 6% figure is in fact the attrition rate: “the figure means that out of every 100 offences that are recorded by the police as a crime, six of them will lead to a suspect being convicted of rape. [Around another six per cent of them will be convicted of a related offence.]” Baroness Vivien Stern, *The Stern Review*, Government Equalities Office and Home Office (2010), at 47.

⁴⁴ The Stern Review noted simply that “only a small proportion of rape is reported to the authorities.” Stern, note 43, at 32.

⁴⁵ Phillips, note 9, at 283.

relegation of certain practices and relationships to a domain marked as 'private', away from the citizen-state relationship which, as an inheritance of liberal presuppositions, has been a focus of neo-republican thought.⁴⁶ An approach which attempts to redress the balance between dominium and imperium makes possible the incorporation of an explicitly feminist element into the republican project, opening the project up to those areas in which domination persists.

Attempts to tear down the barrier between public and private are therefore a recurring feature of feminist thought, much as they are within much critical⁴⁷ and even orthodox⁴⁸ legal literature. In arguing for a republican sympathy with these projects, we are obliged to clarify that neo-republicanism overcomes this barrier not by dismantling it (though its fragility must never be obscured), but instead by providing an ideal in which unfreedom in the private sphere, in one's private relations, is just as unacceptable as that which occurs in the public sphere through the instrument of the state. No-one is forced out into the open, but the choice or the need to remain in private should not condemn any person to the sort of domination that has often resulted there. Though the categories of public and private remain, and with them the imperium/dominium distinction, they denote not spheres of human activity which remain closed off, the one from the other, but instead two forms of relationship which are inevitably interactive. Even the most traditionally 'private' of relationships cannot fail to be impacted by the mere existence of a 'public' power and the coercive apparatus it entails and, specifically, the question of the conditions under which private parties will enjoy the support of - or meet the resistance of - that public power in his or her dealings with various 'others'.

The importance of neo-republicanism therefore becomes clear only when it is realised that the difference between domination by the state on one hand and domination of women and the dispossessed on the other is but a shift of perspective, involving a step back which brings into focus the role of the state in mediating this latter domination. Not only is it true that there is no reason why the republican critique of dominating political systems and rulers "should not apply to the dominance of employers over workers or the dominance of husbands over

⁴⁶ On the public/private distinction in feminism, see Ruth Gavison, *Feminism and the Private-Public Distinction*, (1992) 45 Stanford Law Review 1. On its specific legal implications for feminism, see Katherine Donovan, *Sexual Divisions in Law*, Weidenfeld and Nicolson (1985), generally and chapters 1 and 4 in particular.

⁴⁷ E.g., the symposium in (1981) 130 University of Pennsylvania Law Review.

⁴⁸ E.g., Dawn Oliver, *Common Values and the Public-Private Divide*, Butterworths (1999)

wives”⁴⁹ but such applicability is what makes the neo-republican ideal of non-domination prime a strong candidate for a fundamental principle of social, and eventually legal, analysis. To take this line is to make neo-republicanism more political than it has been hitherto; more willing to discuss the distribution of power in actually-existing societies, and the ability of a given group to interfere arbitrarily with the interests of another. It moves us away from the sort of constitutional incrementalism which assumes that the only significant question of freedom is the correct relationship between citizen and state and the only law relevant to freedom is that which governs that relationship. Where liberal considerations of the role of law in vindicating freedom demonstrate a liminal quality, concerned with unfreedom which is exceptional, occurring at the margin of the social body in relation to individuals whose situation is resolutely dissimilar to that of the ordinary citizen, we are here able to shift our concern, via the inclusion of horizontal domination, to more generalised and pervasive forms of unfreedom. This is a good thing, and must be acknowledged as one. To make this move is to revive the link between the abstract discourse of freedom and the daily lived experience of real people, embedded in real systems, whose lives can be improved only where it is understood that the grand and the mundane are both vital - both *equally* vital - to the protection and promotion of freedom.

3.5 Economic republicanism

Domination by the state (as addressed by a concern for the rule of law in chapter 2 and, later, for issues of constitutional design) or on grounds of gender do not exhaust the scope of the present work. We must not unduly restrict the range of situations in which one party might plausibly be said to dominate another, nor the forms of domination which we wish to undo. It has been suggested that “Skinner’s conception of ‘republican liberty’ fails to capture the spectrum of debate on freedom... because it skirts the wide scope of dependence.”⁵⁰ This failure has the effect of denying the radical potential of republican thought:

“we might conclude that [Skinner’s] own deliberate detachment from social realities is intended to blunt the critical edge of political thought, intended to make it essentially innocuous, intended to weaken its challenge to power, let

⁴⁹ Phillips, note 9, at 288.

⁵⁰ Meiksins Wood, note 8.

alone to the existing social order... his historical work and his mode of contextualisation have the consequence, if not the intent, of narrowing the scope of political debate, no less today than in the English Civil War.”⁵¹

This is correct, and one further example of what is excluded by the unduly circumscribed conception of dependence is that domination which is economic in origin, an exclusion which has significant consequences for the possibility of a republican engagement with contemporary political trends. Republicanism, in opposing itself to liberalism, is implicitly claiming for itself a mantle until recently worn by Marxist thought, but has had very little to say about that aspect of Marxist thought most likely to attract broad support: the centrality of economic factors to social and political processes.⁵² Looking back, there are examples of such an agenda in various places - leading Rousseau to examine the origins of economic inequality and both James Harrington and Tom Paine to make agrarian reform central to their own versions of republicanism⁵³ - but the relevance of these factors as a whole has always been secondary. To pursue this thread is to find underlying neo-republicanism the same concerns as once led Rousseau to declare that “no citizen [should] be so very rich that he can buy another, and none so poor that he is compelled to sell himself,”⁵⁴ a requirement which effectively restates the non-domination ideal. And if the basic idea from which we begin is correct - if domination based on economic inequality is a valid target of neo-republican analysis - then a glance at the world around us would suggest that this is a rich vein to mine. Our discipline is an inherently political one, which can be expected to say much about economic matters.

⁵¹ Meiksins Wood, note 8.

⁵² See Richard Dagger, *Neo-republicanism and the Civic Economy*, (2006) 5 Politics, Philosophy & Economics 151; Alex Gourevitch, *Labor and Republican Liberty*, (2011) 18 Constellations 431; Stuart White, *The Republican Critique of Capitalism*, (2011) 14 Critical Review of International Social and Political Philosophy 561.

⁵³ Harrington supported the dividing up of land so as to make as much of the population as possible independent freeholders (James Harrington, *The Commonwealth of Oceana*, in J.G.A Pocock (ed.), *Harrington: 'The Commonwealth of Oceana' and 'A System of Politics'*, Cambridge University Press (1992), generally.); Paine argued for the provision of pensions to the elderly and disabled, as well as the payment of a lump sum to all upon reaching maturity, paid for via tax on inheritance (Tom Paine, *Agrarian Justice* [1797]). For discussion of the place of agrarian laws in Machiavelli and Harrington, see Iseult Honohan, *Civic Republicanism*, Routledge (2002), at 60-1 and 69-70.

⁵⁴ Jean Jacques Rousseau, *The Social Contract*, in Victor Gourevitch (ed.), *'The Social Contract' and Other Later Political Writings*, Cambridge University Press (1997), at 78. Maurizio Viroli identifies this as one of two republican ideals of equality, the other being that “poverty should not translate into either exclusion from public honors or a loss of repute.” Maurizio Viroli, *Republicanism*, Henry Holt & Company (2003), at 66.

As with feminist concerns, economic domination has remained under-theorised. In attempting to make good on this failing, we will leave aside the majority of older republican thinking - that of Paine and Harrington most notably - in favour of a re-appropriation of a school of thought which, by virtue of its deployment of the non-domination ideal, transcends the context in which it was first elaborated and is of more direct relevance to the current project. The movement derives from the complex American discourse on slavery and freedom, starting from the remarkable fact that “[t]he rise of liberty and equality... was accompanied by the rise of slavery. That two such contradictory developments were taking place simultaneously over a long period... is the central paradox of American history.”⁵⁵ This paradox would seem to imply a strict dichotomy - freedom for the many and slavery for the few, with every person falling into one or the other category - and yet republican perspectives attempted to undermine the categories of slave and freeman by asking whether or not he who worked for a wage, with no property of his own, was free in any meaningful sense. This attempt took on the form of an ideology based around the organising concept known as ‘free labor’.⁵⁶ It is of considerable interest when enquiring what neo-republicanism might have to say about freedom and economic matters.

3.5.1 Free labor

We have hinted earlier at work which attributes to the dominant ideas of the American founding a republican rather than liberal heritage. Either way, freedom was a central concept, and ‘free labor’ ideology represents the continuation of the revolutionary-era focus on freedom, in this case understood as “economic independence, ownership of productive property - not as an end in itself primarily, but because such independence was essential to participating freely in the public realm.”⁵⁷ The concept:

“lay at the heart of the republican ideology, and expressed a coherent social outlook, a model of the good society... an affirmation of the superiority of the social system of the North... whose achievements and destiny were almost

⁵⁵ Edmund S. Morgan, *Slavery and Freedom: The American Paradox*, (1972) 59 *The Journal of American History* 5, at 5-6.

⁵⁶ The spelling reflects the provenance of the concept.

⁵⁷ William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, (1985) *Wisconsin Law Review* 767, at 775.

wholly the result of the dignity and opportunities which it offered the average labouring man.”⁵⁸

He who was not independent in this way, without ownership in the means of production, and thus reliant on a wage, could not fully participate in the political life of the republic, for the fact of being dependent made him “vulnerable to coercion, threatening the integrity of his opinions and his ballot. ‘Independence’ in pursuing one’s economic calling and ‘independence’ as a citizen were entwined.”⁵⁹ The effect of this ideology was to call into question the viability of any polity containing a “large permanent class of propertyless laborers” who were dependent on the economic resources of another.⁶⁰ Wage labour meant economic dependence, and widespread economic dependence threatened the republic itself by depriving it of the good citizenry needed in order to thrive. The solution, according to the nascent Republican party when it was still the party of republican freedom - still pursuing the ideology of the Free Soil Party which it replaced - was homesteading: the encouragement of the urban poor to improve their prospects by migrating westward, aided by a grant of public land available under Lincoln’s Homestead Act 1862. It was thus contingent on the availability of public land to grant, but provided a possibility of geographical and social mobility based on a principle superior to that of slavery, against whose expansion it was hoped homesteaders would provide an effective barrier.⁶¹

3.5.2 Free labor against wage slavery

The view that economic independence put at risk the republic which relied upon virtuous or otherwise ‘good’ citizens - a view capable of appealing to the ‘enlightened’ self-interest of the economic elites - existed alongside a more progressive analysis which fought not for the good of the country but for the rights of labour. Many of these advocates (before abolition):

“dramatized their case against wage labor by equating it with Southern slavery
- “wage slavery,” as they called it. Working for wages was tantamount to

⁵⁸ Eric Foner, *Free Soil, Free Labor, Free Men: The Ideology of the Republican Party before the Civil War*, Oxford University Press (1970), at 11. On its origins in early colonial property regimes, see Joseph G. Rayback, *A History of American Labour*, The Free Press (1959), at 11-21.

⁵⁹ Forbath, note 57, at 775.

⁶⁰ Forbath, note 57, at 775.

⁶¹ Foner, note 58, at 28.

slavery... in the sense that it denied them the economic and political independence essential to republican citizenship.”⁶²

This perspective sees workers reliant on wages not merely as unable to participate fully as citizens but as reduced, in consequence, to little better than those who were the property of others. The claim has a fine (and sometimes republican) pedigree. Cicero distinguished between those who exercised artistic skill for monetary reward and those whose labour was manual:

“Unbecoming to a gentleman, too, and vulgar are the means of livelihood of all hired workmen whom we pay for mere manual labour, not for artistic skill; for in their case the very wage they receive is a pledge of their slavery”⁶³

The comparison between slaves and wage slaves is a feature too of Marxist discourse, Engels noting that while the former is sold “once and for all”, the “proletarian must sell himself daily and hourly” and so lacks the (admittedly miserable) security afforded to the ‘true’ slave; while the slave is protected from market forces, the proletarian lives at their mercy.⁶⁴ And, while the abolition of slavery requires only one adjustment to the law of private property, the proletarian “can free himself only by abolishing private property in general.”⁶⁵ The claim that a wage-earner is unfree therefore marks a point of overlap between the civic and neo-republican traditions, whereby the fact of ‘wage slavery’ produces effects which are undesirable in both traditions - domination on the one hand and the absence of virtue or poor citizenship on the other - and Marxist thought, in which the problem of wage slavery would last as long as the recognition of private (rather than personal) property.

⁶² Michael J. Sandel, *Democracy's Discontent: America in Search of A Public Philosophy*, Harvard University Press (1996), at 172.

⁶³ *De Officiis* I.150, quoted in Zvi Yavetz, *Slaves and Slavery in Ancient Rome*, Transaction Publishers (1998), at 161.

⁶⁴ Frederick Engels, *Principles of Communism* (1847), available at:

<http://www.marxists.org/archive/marx/works/1847/11/prin-com.htm> (accessed 27 February 2013).

⁶⁵ Engels, note 64.

3.5.3 Slaveholders against unfree labor

The argument about wage slavery was not restricted, however, to those seeking to improve the lot of supposedly ‘free’ labourers whose freedom was declared deficient by analogy with that of chattel slaves: such argument was also employed from the other side of the divide by southern slaveholders who contrasted the insecurity of the northern labourer with the condition of southern slavery, noting that: “the condition of the Negro in a state of chattel slavery might be abominable, but the condition of the northern white man in a state of wage slavery was equally abominable.”⁶⁶ Why try, so the argument went, to free the slave population when the conditions of the supposedly ‘free’ workers of the north were, by the admission of some of their own advocates, not significantly better, and likely to be made worse by the entry into the labor pool of emancipated slaves?⁶⁷ Indeed, the slaveholders had a perverse incentive to maintain the physical condition of their slaves at a higher level than did the capitalist in respect of his employees. This former is an asset which can not be replaced without considerable cost; the latter is in theory substitutable for many others within what Marx called the industrial reserve army.⁶⁸ In the absence of coercion by the state apparatus, the employer of a wage slave has little reason to protect his employee’s life and wellbeing. That the ‘wage slavery’ argument could be employed to such different ends demonstrates that the fundamental assumptions of the discourse were still contested: the endorsement of the continuation of slavery implied a rejection of anything like a non-domination ideal. Nevertheless, even the northern workers who could not be persuaded of the advantages of abolition could usually be persuaded that the extension of slavery to the west was contrary to their interests:

“How much worse would the situation become if the western territories were turned over to the slaveocracy? This element regarded ‘slavery as the natural and normal condition of the labouring man.’ It insisted that free society was not only a delusion but a danger in which ‘greasy mechanics’ and ‘filthy operatives’ were able to organize trade associations, engage in strikes, vote,

⁶⁶ Rayback, note 58, at 100.

⁶⁷ One possible answer was that where it existed slavery, a source of substitute labor, was a barrier to union activity. Often, however, white workers were content to simply restrain it within the field of unskilled labor: Bruce Laurie, *Artisans into Workers: Labor in Nineteenth-Century America*, Hill and Wang (1989), at 77.

⁶⁸ On the relationship between Marx and Lincoln see Robin Blackburn, *An Unfinished Revolution: Karl Marx and Abraham Lincoln*, Verso Books (2011).

and attend schools. All this foretold the day when northern states would have to enslave their free workers.”⁶⁹

Attempts to relate the impoverished labor of freemen in the north with the chattel slavery of the south were therefore hampered by the fact that different understandings of freedom caused different groups to talk past each other. If slavery was deprecated on the basis that it constituted a situation of dependence, why was ‘wage slavery’ acceptable? Attempts by slaveholders and advocates of free labor to make this case encountered abolitionists - against slavery, but untroubled by ‘wage slavery’ - who rejected the terms of the debate because:

“they held a voluntarist not a civic understanding of freedom. In their view, the moral wrong of slavery was not that the slave lacked economic or political independence but simply that he was forced to work against his will.”⁷⁰

We must hesitate to map our present categories onto this debate. What Sandel describes as ‘voluntarist’ freedom is fairly conceived as an analogue of liberal freedom, in that the forcing of a person to do something he has no desire to do is an interference with him or her in the sense to which liberal freedom is opposed. That it not merely frustrates the will but substitutes another’s does not alter its fundamental nature but merely heightens the offence against freedom. The question of whether the concerns underlying free labor can be assimilated with the current project’s normative ideal is more problematic. Dependence in the neo-republican project is viewed as *mala in se*, rather than wrongful only to the extent that it undermines the prospects for good citizenship of those who are dependent. It constitutes a more general demand for freedom than seemed to predominate in the free labor context, where the form of non-domination in issue is bounded by civic republican concerns i.e., rather than viewing non-domination as an *a priori* negative, it is so *only to the extent that* neo-republicanism underpins (one variant of) civic republican thought. What is clear is that a perspective founded upon liberal freedom takes no issue with ‘wage slavery’, while non-domination replicates the conclusion of free-labor advocates: not because of its consequences for citizenship, but for freedom: wage slavery is a form of horizontal domination. Like that

⁶⁹ Rayback, note 58, at 101-2.

⁷⁰ Sandel, note 62, at 173.

based upon gender, it is ripe for reappraisal within the neo-republican project, with, once again, the role of public power taking centre stage.

3.5.4 The end of labor republicanism

Much explicit gender-based domination has been excised law, particularly that which was vertical in form. Vertical, economic-based domination was also part of many constitutional orders, most obviously where the franchise was based around property qualifications, and to a certain degree remains so. In relation to horizontal economic domination, however, it was not the problem which disappeared so much as the conception of it as problematic. The labor republican movement, like those others whose understanding of freedom was not easily reconciled with the prevailing system of economic relations, was eventually driven out by that system. With the growth in capitalism during the so-called ‘Gilded Age’ of the post-civil war United States,⁷¹

“defenders of the system of wage labor would abandon the attempt to reconcile capitalist production with the civic conception of free labor, and take up the voluntarist conception instead. Wage labor is consistent with freedom... simply because it is voluntary, the product of an agreement between employer and employee.”⁷²

Where it is difficult to date the point at which liberal freedom won out over republican freedom (indeed, the relevant ‘victory’ is perhaps best understood as a process, starting with Hobbes and only ending in the middle of the 20th century) it is perhaps easier to be certain of the point at which a voluntarist conception of freedom won out in law, for it was this same voluntarist conception which the “Supreme Court of the *Lochner* era would attribute to the Constitution itself.”⁷³ In doing so, it endorsed the claim that negotiations between employer and employee take place between free and equal parties and that the outcome which results

⁷¹ The ‘Gilded Age’ in American history, from roughly the end of the Civil War in 1865 until the election of 1896, was marked by pervasive corruption and exceptional material inequality and takes its name from the novel by Mark Twain and Charles Dudley Warner, *The Gilded Age: A Tale of Today*, (1876). The ‘new Gilded Age’ was applied to the culture of affluence in the late 1990s but has re-emerged in far broader usage to describe the situation of stark inequality that characterises the contemporary world.

⁷² Sandel, note 62, at 171.

⁷³ Sandel, note 62, at 171.

from those negotiations should not be interfered with by the state. Freedom of contract includes the freedom to agree to work long hours for starvation wages. This point ties together our argument about economic unfreedom (in the particular form of ‘wage slavery’) with the broader point about the centrality of the state’s role in reducing horizontal domination.

3.5.5 The Slaughter-House cases

In the Slaughter House cases of 1873, the US Supreme Court was called upon to judge the constitutionality of an Act of the Louisiana legislature banning all butchering except that which took place in a central slaughterhouse, thereby requiring all butchers to use only those facilities and pay the appropriate fee to do so.⁷⁴ The Court upheld the statute, reading the privileges or immunities clause of the Fourteenth Amendment narrowly as protecting only those rights enjoyed by citizens in their capacity as citizens of the United States and therefore not as citizens of the individual states. The threat to free labor was in this case very clearly mediated by the state, the monopoly granted condemning those who made a living as butchers to live at the mercy of others, being unable to carry on their trade independently. The majority opinion denied that the Fourteenth Amendment was aimed at such situations:

“Was it the purpose of the fourteenth amendment... to transfer the security and protection of all the civil rights which we have mentioned, from the States to the Federal government? And where it is declared that Congress Shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States?”⁷⁵

Answering in the negative, the majority decision rendered the clause a “vain and idle enactment” said the dissenting Justice Field, who recognised the right of the state to “prescribe such regulations for every pursuit and calling of life as will promote the public health, secure the good order and advance the general prosperity of society” but that “the pursuit or calling must be free to be followed by every citizen who is within the conditions

⁷⁴ 83 US 36 (1873).

⁷⁵ 83 US 36 , at 77.

designated, and will conform to the regulations.”⁷⁶ The statute in question had departed from this imperative, such that a man could pursue his vocation only on the terms set for him by others: he could never be independent in the relevant sense for, by the statute, “the right of free labor, one of the most sacred and imprescriptible rights of man, is violated.”⁷⁷ Later, courts “would adopt Field’s view of the Fourteenth Amendment, but not his republican understanding of free labor... they understood free labor in its voluntarist sense - as the right of the worker to sell his labor for a wage,” seizing on a footnoted reference to the work of Adam Smith.⁷⁸ The decision in the later *Lochner* case was merely the culmination of the longer process whereby the (republican) free labor ideal was interpreted out of law.

In that case, *Lochner v New York* (1906), the US Supreme Court held a “liberty of contract” was implicit in the due process clause of the Fourteenth Amendment.⁷⁹ The case involved a New York law that limited the number of hours that a baker could work each day to ten, and each week to sixty. By a 5-4 majority, the Supreme Court denied that the law was necessary to protect the health of bakers, holding it an “unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract.”⁸⁰ Though its legacy is much contested,⁸¹ *Lochner* is most famous for having inaugurated an era (to which it lent its name) of judicial resistance to the regulatory efforts on the part of the disenfranchised by an increasingly ‘interventionist’ state,⁸² an issue which takes on greater significance in the context of New Deal attempts to counter the great recession, and which came to an end only with the ‘switch in time that saved nine’ by Robert Owen in *West Coast Hotel Co. v Parrish* in 1937.⁸³ Sandel suggests that only does the court in *Lochner* endorse an “economic theory which a large part of the country does not entertain” as Holmes, dissenting,

⁷⁶ 83 US 36, at 110.

⁷⁷ 83 US 36, at 110.

⁷⁸ Sandel, note 62, at 194.

⁷⁹ 198 US 45 (1905).

⁸⁰ 198 US 45, at 45.

⁸¹ See, e.g., Cass Sunstein, *Lochner’s Legacy*, (1987) 87 Columbia Law Review 873 and David Bernstein, *Lochner’s Legacy’s Legacy*, (2003) 82 Texas Law Review 1. In 1980 John Hart Ely felt confident pronouncing that all the cases referred to as making up the *Lochner* era, were “universally acknowledged to have been constitutionally improper.” John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review*, Harvard University Press (1980), at 14.

⁸² Horwitz suggests that attacking *Lochner* for supposedly representing the worst sort of judicial activism was a strategic choice by New Deal progressives, who found it easier to present their political position as “a healthy and normal corrective to a *Lochner* Court that had strayed from a historically neutral baseline of democracy and judicial restraint,” that as a “justifiable overthrow of anachronistic nineteenth-century liberalism.” Morton J. Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, (1987) 29 William and Mary Law Review 57, at 62.

⁸³ 300 US 379 (1937).

claimed,⁸⁴ but that it gave a constitutional seal of approval to a concept of freedom that had, until recently, struggled for supremacy with an equally plausible variant.⁸⁵ When we talk of *Lochner* in relation to the extent of permissible interference within the outcome of free bargaining between legal persons, disputing only the correct location of the boundary, we have in a sense demonstrated the extent to which the version of freedom the court endorsed therein predominates. What is at stake in *Lochner* is not the extent to which we should interfere with freedom but what we understand by freedom: the liberal, voluntarist, freedom which underpins *Lochner*-era laissez-faire, or a more nuanced version of the sort at stake in talk of free labor, which seeks to prevent the individual from being dominated by others. Endorsing the latter frees one from the concession inherent in the notion that to regulate employment is always and everywhere an interference with freedom.

3.5.6 Wage slavery and non-domination

Though this discussion has advanced our argument significantly, providing an understanding both of wage slavery as a republican concern, and of the (unique) ability of the state to guard against it, we are not yet where we want to be. The works discussed to this point belong to a distinctive subset of the tradition which, even where it has made a mark more recently has done so only in the context of a civic republican project. How much of the argument holds true in the context of the non-domination ideal? We can start from Philip Pettit's review of the book in which Sandel looks to give renewed prominence to these ideas as a means of providing America with a 'public philosophy.' Though Sandel writes at the tail end of what we have called the first republican revival, Pettit attempts to claim this territory for his own project, suggesting that free labor concerns make more sense if the underlying project is seen as being that of reducing domination, for it "seems artificial to construe the complaint as an expression of concern for the quality of the citizenry and the prospect for selfgovernment."⁸⁶ This is correct to the extent that, thus phrased, the rejection of wage slavery takes place in terms which make no attempt to appeal to the 'wage slaves' themselves. The elites, those

⁸⁴ 198 US 45, at 75.

⁸⁵ Sandel, note 62, at 194. Alex Gourevitch dissents in part, suggesting that the conception of freedom in *Lochner* was not alien to republicanism, but "began as an explicitly republican argument about free labor" - a laissez-faire republicanism opposed to the full labor republican conception he associates with Lincoln, "an essential, inalienable human faculty, linked to personal development and economic independence." Alex Gourevitch, *Labor and Republican Liberty*, (2011) 18 *Constellations* 431, at 439-40.

⁸⁶ Philip Pettit, *Reworking Sandel's Republicanism*, (1998) 95 *The Journal of Philosophy* 73, at 94.

who see themselves as guardians of the republic, desire ‘good’ citizens; those who they desire to mould into such citizens are more likely to desire to eat. Similarly, the ‘prospects for selfgovernment’ reflect a secondary desire which can be pursued only where a primary obstacle - the fact of being governed by another - is already removed.

There exists a middle ground between slavery and a capability for self-government and it is at this middle ground that we must first aim. Pettit claims we will be able to avoid the artificiality of Sandel’s position if “we adopt [his] account of republicanism and take the concern with freedom as nondomination to have been at the heart of republican worries.”⁸⁷ This conflates two arguments of differing plausibility - on one hand, the idea that the non-domination ideal is a better ‘fit’ for the political project in which labor republicans were engaged, to the extent that it, rather than a civic republican concern for virtue, is able to account for their verdict on ‘wage slavery’. On the other, the idea that non-domination might have in fact provided the normative thrust of the argument all along. If such a claim is impliedly made, it seems unsustainable. Were we, however, to proceed with our analysis on the basis suggested by Pettit, we would join him in concluding that the:

“dependency of employee on employer is almost bound to give the employer a certain power of arbitrary interference in the life of the employee... employees are going to assume the profile of unfree, dominated agents. They are going to seem no better than slaves in the extent to which they live at the mercy of employers... They are going to be presented... as ‘wage slaves.’”⁸⁸

Pettit therefore presents his neo-republicanism as capable of taking up the mantle of the labor republican project and vindicating it in a fashion for which civic republicanism lacks the conceptual resources. Our task is to demonstrate not merely that it is capable, but that such a shift is imperative; that law is the cause of wage slavery, and law can put an end to it.

⁸⁷ Pettit, note 86, at 94.

⁸⁸ Pettit, note 86, at 94.

3.6 Conclusion

Not for the first time, we see that part of what makes the non-domination ideal ‘republican’ is the manner in which it encompasses older republican concerns. We move to an attempt to provide a general account of the relationship of property to freedom, attentive (as in this chapter) to the role of the state in mediating the relationships between individuals, with a view to tackling head-on the use to which the variant of freedom endorsed in *Lochner* is now put.

Part 2 - Chapter 4: Problems of Freedom and Property

4.1 The contemporary vocabulary of freedom

Given that neo-republican thought provides an alternative to prevailing liberal ideas with, at its centre, a distinctive conception of freedom, it is to be expected that its specific points of dispute with liberal thought will derive from that conception: neo-republicanism will challenge liberal thought wherever their different points of departure lead to different destinations. Considering the use to which neo-republicanism has so far been put, a single fact stands out above all others: a failure to engage with the neo-liberal project and that project's deployment of the language of liberty. Such failure is inexplicable. Although the ideal of freedom was central to the brief moment of post-war consensus in the developed west in favour of certain legal and political reforms, aimed at the sort of tyranny which had defined the 1920s and 30s (and of which the United Nations declaration of Human Rights on one hand and the Bretton Woods system on the other might be taken as paradigmatic) that consensus enjoyed a monopoly of rhetoric of freedom for no time at all.

Nowadays the language of freedom is largely the preserve of those who seek to disrupt the remnants of that system, rather than to justify or retrench it; of those who speak not against totalitarian regimes but social democrats, socialists, and anything that might be labelled as such. The freedom here is that which stood at the centre of Lochner-era laissez-faire; it is not, in the first place, the freedom of people, who are constituted as consumers first and human beings second, but that of corporations, markets and exchange. Here we witness the subordination to 'freedom' of all other values and the translation of a political dogma into a set of governmental fundamentals of universal validity. While the commitments associated with older (prominently social) liberalism persist, still based upon the logic of non-interference, it is no longer a language of unitary freedom - a holistic conception of what it means for an individual to be free touching on every aspect of his or her existence - but of (multiple) freedoms, these various fragments now more closely equated with specific and limited (legal) rights than with an over-arching project; the claim to promote a unitary freedom is largely the preserve of those who refer specifically to the economic freedom of

late-modern capitalism: those who can be described, loosely but nevertheless adequately, as neo-liberals and libertarians.¹

4.2 Neo-liberal freedom

Hayek struggles forward a coherent conception of freedom: he is unsure if he is concerned about mere interference as a threat to freedom or if interference threatens freedom only where perpetrated on an arbitrary basis. The confusion is unfortunate, but not significant, for Hayek's definition of arbitrariness is so broad as to collapse the distinction, leading to Hayek's identification of an antithesis between rule of law requirements and the welfare state.² Along the axis on which neo-republicanism distinguishes its conception of freedom from that of liberalism, Hayek's account therefore folds back upon itself. Milton Friedman, another prophet of capitalist freedom in the circumstances of cold war polarisation, provides a dualist account of freedom - economic and political - in which the former is both a component of a broader freedom and "an indispensable means towards the achievement of political freedom"³ and, on this basis, argues for a minimal state whose major functions are to "preserve law and order, to enforce private contracts, to foster competitive markets."⁴ Fundamentally, that conception is a negative one: the individual is free when left alone. Not, as Berlin suggests, because when left alone the individual can choose amongst multiple conceptions of the good but instead so as to constitute man as homo economicus. Where 20th century liberalism as taken up by Berlin and Rawls is oriented towards plural visions of the

¹ The origins of neo-liberalism can be traced to the Walter Lippman Colloquium in Paris in 1938 centred on discussion of Lippman's book *An Enquiry into the Principles of the Good Society*. The colloquium and its consequences (in terms of both neoliberalism and the German ordoliberalism with which it stood in an ambiguous relationship) are central to Michel Foucault's, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979*, Palgrave Macmillan (2010). Certain attendees went on to establish the Mont Pelerin Society, the founding statement of which noted the degradation of values of civilisation, a development ascribed to moral relativism and "a decline of belief in private property in the competitive market" (quoted in David Harvey, *A Brief History of Neoliberalism*, Oxford University Press (2005), at 20). Ordoliberalism and neoliberalism both posit a greater role for the state than would be permitted by libertarianism, encompassing both the intervention necessary to ensure sufficient competition within markets and to create the market in the first place through the assignation of property rights. For an early, sympathetic, overview of the German ordo/neo-liberals and their resumption of "the never-ending task of balancing social justice and freedom, communal man and individual man, reason and will," see Carl J. Friedrich, *The Political Thought of Neo-Liberalism*, (1955) 49 *The American Political Science Review* 509, at 525.

² F. A. Hayek, *The Road to Serfdom*, Routledge (2001), generally, but at 75-91 in particular.

³ Milton Friedman, *Capitalism and Freedom*, University of Chicago Press (1967), at 8. Friedman did more than most to promote the implementation of conservative ideals of freedom, training many of the 'Chicago boys' - Latin-American economists trained by Friedman and Arnold Harberger at the University of Chicago who worked with and advised often despotic rulers, most notably General Pinochet.

⁴ Friedman, note 3, at 2.

good, here one good is prized above all others: unobstructed participation in the market. It is these ideas and the policy programmes built upon them - deregulation, the privatisation of utilities, private sector provision of a reduced range of public services, the pursuit of price stability as opposed to full employment, the reduction of welfare provision and the unfettered circulation of capital - which have characterised late modernity: in the developed world as part of the Thatcher/Reagan revolution and in the developing world as part of the World Bank/IMF one size fits all approach to development.

4.2.1 Rhetoric and reality

In tracing the history of neo-liberalism, David Harvey has identified the relationship which exists between its particular understanding and relentless promotion of freedom, and the effective transfer of wealth which results, time and time again, from the policy prescriptions which implement that commitment. Harvey suggests two interpretations.⁵ The first takes seriously the neo-liberal commitment to freedom and the economic advancement supposed to follow from it, treating the economic disparities which follow in its wake as an inadvertent by-product: it is “a utopian project to realize a theoretical design for the reorganization of international capitalism” which is inseparable from the project of increasing freedom.⁶ Anyone sufficiently committed to the pursuit of freedom would be entitled to conclude that inequality is not just a price worth paying but indeed morally desirable. Freedom would reveal itself an inhuman ideal, but we would nevertheless be true to it. Alternatively, the neo-liberal project might be thought to have as its true aim the degradation of the material conditions of the majority (and corresponding transfer of wealth to an economic aristocracy), with the discourse of freedom merely a convenient ideological cover for what is in fact “a political project to re-establish the conditions for capital accumulation and to restore the power of economic elites”⁷ - a narrative which, in terms of where the gains of economic growth have accrued, fits the facts at both the national and the global level. In light of the vast

⁵ Harvey, note 1, at 19.

⁶ Harvey, note 1, at 19.

⁷ Harvey, note 1, at 19. The issue is complicated by the presence in Hayek's work of two mutually reinforcing themes: a commitment to freedom explored most directly in his *The Road to Serfdom* (1944) and *The Constitution of Liberty* (1960) and work on economics which focuses upon the epistemological deficit which renders impossible central economic planning and celebrates the price mechanism for its ability to secure the optimum distribution of goods: e.g., *The Use of Knowledge in Society* (1945) 35 *The American Economic Review* 519. These projects, never distinct, are most clearly merged in Hayek's *Law, Legislation and Liberty* (3 volumes, 1973-9), which applies his thesis as to the superiority of the spontaneous order over the planned to law, via the distinction between ‘nomos’ and ‘thesis’.

historical evidence of the effects of the neo-liberal project, of which the 2008 banking crash (which Harvey's book predates) is merely the latest example, the latter interpretation seems more convincing: the neo-liberal project "has not been very effective in revitalizing global capital accumulation but it has succeeded remarkably well in restoring, or in some instances... creating the power of an economic elite."⁸ The real-world effects of neo-liberal reforms therefore provide a strong temptation to dismiss the rhetoric of freedom in which it is clothed. It is nevertheless incumbent on us to take seriously the neo-liberal claim to prize freedom while remaining sensitive to the possibility that its policy prescriptions are motivated by ulterior ends. Neo-liberalism will not disappear when the incoherence of its claims are demonstrated, but only by dismantling that rhetorical shield can its true motivations be laid bare, for the acquisition by elites of consent from those who might be better understood the victims of 'freedom' rather than its beneficiaries (of which the American Tea Party movement is perhaps the clearest example in recent years) is all that permits the project to retain compatibility with democracy.

Where freedom is invoked, then, in mainstream political discourse, it is at least as likely to be in the context of a neo-liberal as modern liberal argument, referring not to the protection of a zone of personal freedom against the state in which one can pursue one's own affairs, but to the removal of the state - as far as possible - from the regulation of human activity in order that market activity can be pursued without obstruction. Lawyers use law to protect *freedoms* which are in fact more fundamentally threatened by a political project which promotes *freedom*.

4.2.2 The role of the state

In more strictly libertarian thought, the state retains a role, residual and largely passive, in providing the framework within which that market activity takes place: here the dominant account is that of Nozick, whose night watchman (minimal) state is "limited to the functions of protecting all its citizens against violence, theft, and fraud, and to the enforcement of contracts,"⁹ and distinguished from a hypothetical ultra-minimal state which renounces even these minimally redistributive goals inherent in the mandatory taxation to pay for the

⁸ Harvey, note 1, at 19.

⁹ Robert Nozick, *Anarchy, State and Utopia*, Basic Books (1974), at 26.

protection of others, providing protection “*only* to those who purchase its protection and enforcement policies.”¹⁰ Where either such state exists, the market is left to provide desired goods through a series of free transactions, which are free precisely because the state plays no role in their execution and - again on Nozick’s telling - any particular distribution of wealth which results is just to the extent that it derives from a series of free transactions.¹¹ Neo-liberalism augments this account by positing an active role for the state in constituting markets in contexts in which they will not spontaneously arise and combating the failures of those markets to the extent that such failures are now recognised as inevitable. This might mean recognising property rights which were previously not part of the law or the privatisation of state utilities or monopolies, while minimal intervention is demanded on the dual bases that the state lacks the knowledge necessary to provide for a distribution of rights more efficient than that which results from market mechanisms, while any attempt at intervention risks being ‘captured’ by groups which wish to direct it towards their own private ends.¹²

If neo-republicanism desires to ground a useful and genuine political project; to transcend the limitations of abstract theorising through which neo-liberalism burst with the dawn of the Thatcher-Reagan era, then it is against the neo-liberal/libertarian turn that it must posit itself as an alternative. It is here, rather than in the slightly outdated and complacent pluralistic liberalism, that the politics of neo-republicanism find their most acute rival. Where the bare idea of negative freedom is incomplete and unambitious, in the hands of those who suffocate its plurality, it becomes positively harmful. It is on this ground that neo-republicanism must fight.

¹⁰ Nozick, note 9, at 26-7. In the latter case, not one but multiple protection associations would exist in order to vindicate individual rights. Nozick, however, contends that a situation of plural protective associations would, via invisible hand mechanisms, transmute into one in which there was a single, dominant protective association in any given territory, bringing all persons within a system which judges between their conflicting claims and enforces their rights. Given that it is a violation of natural right to have a monopoly on the use of force in a territory and *not* provide protection to all within that territory, the ultra-minimal state is obliged to become the minimal state.

¹¹ Nozick, note 9, at 150-178.

¹² Another feature of the task the neo-liberal state sets itself – “to create and preserve an institutional framework appropriate to” private property rights, free markets, and free trade (Harvey, note 1, at 2) – is the guaranteeing of the “quality and integrity of money”. Such a task is in considerable tension with the pursuit of full employment as a macro-economic goal.

4.3 The distribution of property and freedom

Let us return to basic principles of liberal thought. A significant blind spot of unqualified liberal freedom (as non-interference) is to be detected in its treatment of economic questions: specifically that of whether material deprivation reduces freedom. Most such analyses agree that it does not: as a negative conception liberal freedom is concerned only with obstructions, and the state of affairs in which an individual cannot do those things which he desires to do as a result of possessing insufficient material resources involves no such obstruction, unless the acquisition of the necessary resources is actively obstructed. If what prevents the desired exercise of one's autonomy can be conceptualised as resulting from a lack of resources and the acquisition of those resources is unhindered, then one remains free. Material deprivation is not constitutive of, nor does it contribute to, a situation of unfreedom. This is clear in Berlin:

“It is important to discriminate between liberty and the conditions of its exercise. If a man is too poor or too ignorant or too feeble to make use of his legal rights, the liberty that these rights confer upon him is nothing to him, but it is not thereby annihilated.”¹³

Berlin's position, that the conflation of liberty and the conditions of its exercise smuggles into the concept a theory of political economy, is a reasonable one. It seems true, as Galipeau suggests, that “Berlin holds to the distinction for historical reasons”¹⁴: an acute awareness of how attempts to alter (probably by levelling out) the conditions of exercise of freedom have historically implied significant interference with individual liberty.¹⁵

Rawls similarly chides those who make money a condition of the existence of freedom, rather than of its successful exercise:

¹³ Isaiah Berlin, *Five Essays on Liberty: Introduction*, in *Liberty*, Oxford University Press (2002), at 45.

¹⁴ Claude J. Galipeau, *Isaiah Berlin's Liberalism*, Cambridge University Press (1994), at 98.

¹⁵ Berlin was born in Tsarist Riga and lived through the Russian revolution in Petrograd: “when contemporaries were intoxicated with revolutionary Marxism, the memory of 1917 continued to work within Berlin, strengthening his horror of physical violence and his suspicion of political experiment, and deepening his lifelong preference for all the temporising compromises that keep a political order safely this side of terror.” Michael Ignatieff, *Isaiah Berlin: A Life*, Chatto & Windus (1998), at 24.

“The inability to take advantage of one’s rights and opportunities as a result of poverty and ignorance and a lack of means generally, is sometimes counted among the constraints definitive of liberty. I shall not, however, say this, but rather I shall think of these things as affecting the worth of liberty.”¹⁶

Rawls claims that this unequal worth of liberty is “compensated for, since the capacity of the less fortunate members of society to achieve their aims would be even less were they not to accept the existing inequalities whenever the difference principle is satisfied.”¹⁷ The difference principle legitimates social and economic inequalities only “they are to be to the greatest benefit of the least advantaged members of society,”¹⁸ and so Rawls’ argument is that those who are less well-placed to enjoy their liberties are the beneficiaries of any new inequalities - they are not being compensated for an unequal distribution of liberty but for its lesser worth. Given that liberty is equal, but its value not, the project of social justice from a Rawlsian perspective becomes that of organising the ‘basic structure’ of society - “the way in which major social institutions fit together into one system, and how they assign fundamental rights and duties and shape the division of advantages that arise through social cooperation”¹⁹ - to “maximize the worth to the least advantaged of the complete scheme of equal liberty shared by all.”²⁰ The consideration of material resources *succeeds* rather than contributes to the project of securing freedom, this latter aim being achievable with no reference to material circumstances.

Hayek is even less concerned, arguing that there exists a “confusion of liberty as power with liberty in its original meaning” which obscures that “whether or not I am my own master and can follow my own choice and whether the possibilities from which I must choose are few or many are two entirely different questions.”²¹ Philippe Van Parijs’ attempt to evade this by distinguishing what he calls ‘real’ freedom from the ‘formal’ freedom of negative liberty through the incorporation of a consideration of opportunity as the third element (alongside the criteria of security and self-ownership which make up ‘formal’ freedom) is undone by his

¹⁶ John Rawls, *A Theory of Justice*, Harvard University Press (1971), at 204.

¹⁷ Rawls, note 16, at 204-5.

¹⁸ John Rawls, *Political Liberalism*, Columbia University Press (1993), at 6.

¹⁹ Rawls, note 18, at 258.

²⁰ Rawls, note 16, at 326.

²¹ Hayek, *The Constitution of Liberty*, Routledge (1960), at 17. This is in keeping with Gray’s suggestions, discussed above, that Hayek is best understood as a theorist of positive freedom.

identification of inability resulting from lack of resources with inability resulting from physical incapacity.²² There are, we shall see, vital differences between the two, and so the corrective is no such thing.

4.3.1 Definitional purity

Neither Berlin nor Rawls, then, wishes to declare material questions irrelevant to his larger project, but both relegate them to the domain of freedom's exercise; their place in the picture is secured, but they are banished from the foreground. The focus upon active obstruction within liberal freedom therefore limits the scope of any project based (exclusively) upon it. It allows one to draw a stark boundary between that which offends - a person unable to do as he desires because some other individual prevents him - from that which does not - a person unable to do what he desires as a result of a material deprivation which is no fault of his own. This is the result even where what is desired is in each case the same. In the former case, the individual is unfree; in the latter, he is free but contingently incapable of exercising his freedom. His abstract freedom exists, but is 'nothing to him' in Berlin's infelicitous phrase; in Rawl's terms, it is merely of lesser value than it might be. The quantum of freedom is unconditioned by material deprivation.

To insist, as does Berlin, that this distinction is but an unfortunate consequence of definitional purity - that it of course remains available to us to sacrifice liberty for some other good, as he himself is willing to do - as long as we are willing to openly state that we do so, is not wholly satisfactory, not least because few putative goods are capable of challenging the rhetorical supremacy of the ideal of freedom. It reduces our analysis to a crude dichotomy between freedom-reducing active obstruction and non-freedom reducing material circumstances. But there remains an economically-conditioned middle ground between what a liberal would accept as freedom-reducing and the utter passivity that characterises the world liberals see as existing alongside, but not causing, the practical incapability declared irrelevant to freedom. This middle ground, occupied by an understanding of the distribution of wealth as reflecting human agency (rather than as an immutable 'given' of human existence), is of particular import given that it has been colonised by those who share Berlin's concept of negative

²² Philippe Van Parijs, *Real Freedom for All: What (if Anything) Can Justify Capitalism?*, Clarendon Press (1995), at 21-4.

liberty but not his willingness to countenance its sacrifice for other goods: the claim that the extent of freedom is not a function of one's material resources becomes an important weapon in the libertarian arsenal.

4.4 Liberalism, capitalism and freedom

There has been advanced a view which, despite accepting the premises from which Berlin departs (Rawls, it will be remembered, is not strictly a theorist of negative liberty) rejects their standard application to this issue. G. A. Cohen, most notably, suggests that negative freedom is less tolerant of economic deprivation than has been assumed, and so its invocation in support of the practices of modern capitalism and the material inequality which results should attract our suspicion.²³ One argument requires us to step back and consider the question of individual freedom within the context of one's class status. Any one member of the proletariat, so the liberal argument goes, is capable at any time of swapping his prior status for that of capitalist or (more likely) petty bourgeoisie: to do so is difficult and high-risk (failure might ruin him) but there is no a priori reason for which it might not happen. The absence of any obstacles to his doing so is held to be conclusive of his freedom. Notwithstanding his status in the meantime, he is free to become something other than what he is. Not so, counters Cohen, for the capitalist system is constructed so as to ensure that though all are free in this way, they are so only if only some of them ever choose to exercise that freedom.²⁴ Not everyone can transcend his status in this way and so despite the absence of obstruction to any particular individual, the proletariat as a whole are effectively imprisoned by their status within the hierarchy. The 'freedom' of each individual obscures the collective unfreedom of those excluded from ownership of productive resources. The methodological individualism of liberalism neglects to see man in his (necessary) condition of plurality: by limiting itself in the view it takes of the individual, it can deny the reality of his situation. The individual, on the other hand, who sees beyond his own status and is aware of himself as one actor in a collective struggle, knows fine well that his ostensible individual freedom is vitiated by the collective unfreedom of those with whom he shares his existence:

²³ Cohen's writings on this point include *Capitalism, Freedom and the Proletariat*, as well as *Freedom and Money*, both found in the posthumous collection of his work: Michael Otsuka (ed.), *On the Currency of Egalitarian Justice, and other Essays on Political Philosophy*, Princeton University Press (2011), as well as the book *Self-ownership, Freedom and Equality*, Cambridge University Press (1995).

²⁴ Cohen, *CFP*, note 23, at 157-62.

the minimum of solidarity which necessarily derives from seeing oneself as a member of a certain socio-economic group reveals the poverty of the liberal position.

This attempt to circumvent the logic of liberal freedom, however, is founded upon an oversimplified picture of class structure that has been blurred in recent years. And, even if it is true to say that those at the bottom are collectively unfree as part of their class, this does not exclude the possibility of further, individual, unfreedom within it. As John Gray points out, we would not normally hold that social goods were not available to any one person, simply because they were not available to all persons simultaneously.²⁵ The consideration of the group status of the individual, even though he is not subsumed within that group, leaves him at the mercy of false assumptions about how he is affected by membership of it, and how he relates to others within it. Cohen is also, Ian Carter suggests, unduly optimistic about the ease of escape from the proletarian class, which is a much more arduous process than Cohen allows and “if escaping from the proletariat involves saving and working extremely hard, then to do so is impossible in combination with a great many actions which are performable by proletarians who do not try to escape.”²⁶ To the extent that he focuses on how individual freedom is used to obscure collective unfreedom, Cohen looks past the fact the diluted form that the individual freedom takes.

4.4.1 Money versus interference

Cohen provides a second argument for unfreedom arising from lack of resources, not tied to any account of class structure, but beginning from the fact that the sort of interference inherent in private property as an institution can be overcome by those with sufficient resources:

“If A owns P and B does not, then A may use P without interference and B will, standardly, suffer interference if he attempts to use P. But money serves, in a variety of circumstances... to remove that latter interference. Therefore

²⁵ Gray suggests that a ‘true’ Marxist theory of freedom would conclude, following Feuerbach on religion, that the system of commodity production renders unfree to the extent that relations between men are transformed into relationships between things, putting both capitalist and proletariat, at the mercy of impersonal forces. Man creates commodities, only to be ruled by their logic. John Gray, *Marxian Freedom, Individual Liberty, and the End of Alienation*, (1986) 3 Social Philosophy & Policy 160, at 166.

²⁶ Ian Carter, *A Measure of Freedom*, Oxford University Press (1999), at 255.

money confers freedom, rather than merely the ability to use it, even if freedom is equated with absence of interference.”²⁷

We can see that if money can overcome unfreedom it might be said, conversely, that not having money renders unfree. If I have the option of buying something, then not having money to do so might be said to mean I am not free to have it. Obviously, the more fundamental to my needs is the thing I wish to have but cannot afford, the more consequential is this lack of freedom. Beyond a certain threshold, it might be of no consequence whatsoever. Elsewhere, Cohen elaborates, distinguishing lack of money from lack of physical capacity:

“To have money *is* to have freedom, and the assimilation of money to mental and bodily resources is a piece of unthinking fetishism, in the good old Marxist sense that it misrepresents *social relations of constraint as things* that people lack.”²⁸

The identification of inability resulting from economic factors with that which results from inherent incapacity - as by Van Parijs - cannot be sustained. This is confirmed by a consideration of the relational nature of freedom, in whose absence the distinction is clear: if I am unable because physically incapable, I will remain so even if entirely isolated from other persons. If, instead, I am unable to enter onto private land, for example (because to do so would require payment of money which I do not possess) then, were the relationship between me and he who stops me to disappear, so too would my incapacity. Economic inability, unlike inherent inability, may or may not be freedom-reducing but money can overcome the former and not the latter. Even starting from a liberal idea of freedom, we must reject its typical application to such a situation and agree that a lack of money can, and frequently will, render unfree. The commodification of previously non-market goods in contemporary society in this sense contributes to that unfreedom: the more goods whose distribution is determined by market functioning, the more obstacles will exist which only material resources can overcome, and the more consequential will be my penury.

²⁷ Cohen, *Freedom and Money*, note 23, at 176.

²⁸ Cohen, *Self-ownership*, note 23, at 58-9.

4.5 A republican take on freedom and money

A republican consideration of the question proves distinctive and useful. It begins from the point emphasised in chapter one about the relational nature of the ideal of freedom as non-domination. Such relationality restricts the application of the ideal to a situation of at least minimal plurality. Where there is no real or potential interaction, no ‘other’ in respect of which one’s condition of freedom can be assessed, then the situation cannot be encoded within the republican schema and so, whatever might be said of it, it will not be said in the language of neo-republicanism. Applied to the context of material deprivation, it becomes clear that, in and of itself, such deprivation is not a source of unfreedom. Absent other factors, an individual alone, without the resources to meet his needs, is not unfree. In the neo-republican context, material insufficiency is not *per se* freedom-reducing.

4.5.1 The presupposition of plurality

In order to move from an isolated individual, destitute but not enslaved by his poverty, the following must be added to the picture. Firstly, another economic unit, an ‘other’ whose presence inaugurates the relationship that is the subject of the republican judgement and so makes judgement possible. Such relation, however, cannot be one of domination where the material deprivation of our first unit is shared by our second. Where both A and B are equally lacking, neither’s lack will permit the other to arbitrarily interfere with his interests. In the state of nature, or in more prosaic conditions in which the governing institutions are incapable of fulfilling the protective role republican thought ascribes to them, then our relationship may be one of domination, for the ability to interfere arbitrarily might arise from some other factor - brute strength, say - but ignoring such extra-legal factors (remembering that the republican state seeks to exclude the possibility of legally-sanctioned relationships of domination but where one party is willing and able to flout the law, that exclusion will never be absolute) we have a relationship of something approaching equality, no matter how miserable and iniquitous with respect to the wider world. Each lacks, but each is, in respect of the other, free; whatever inability each must overcome is not a function of the other’s being. For material deprivation to give rise to unfreedom we must go further.

4.5.2 Relative inequality and republican freedom

In order for the relationship in question to be one of domination, it is not enough that there be two individuals, one of whom lacks material resources. The second unit must be one who does not share the first's predicament but enjoys greater resources, if the relationship between them is to constitute a relationship of domination. How much greater must they be for a simple relationship of relative equality to be transformed instead into one in which the poverty of one becomes a causal contributor to a status of unfreedom? Simply, material inequality becomes sufficient to render unfree when it is so great as to permit the wealthier party to interfere arbitrarily with the interests of the poorer. The quantification of this will be context-sensitive, but it will cover not just the classic monopolistic situation where one party owns the proverbial 'only well in the village' but also those situations in which one of the parties can meet his or her needs, fulfil his or her desires, with no reference to the wishes of the other, and yet that other can not, and so is bound to the first, in thrall to him or her in a manner ripe for exploitation. The analysis therefore depends in significant measure on what it is that is owned. In a world of plentiful resources, with vast quantities of the various necessities - land, water etc -owned either in common or not at all, any attempt by one party to interfere arbitrarily with the interests of another will likely be in vain. That there remains open to the other party other means by which he can meet his needs and fulfil his desires indicates that he will be able to avoid arbitrary interference and consequent unfreedom. We have noted how the antebellum solution to the problem of unfree labor was to make a grant of capital (at that point land) which would permit the requisite self-sufficiency to free workers from dependency on others. Where all capital rests in private hands, such a solution is obviously more problematic. It is not, however, an impossibility, for there is nothing inherent in the concept of ownership that means it must always and everywhere imply a right to exclude all others for any reason or for none.

The potential for relative inequality to result in a relationship of domination connects a neo-republican to Rousseau's claim that "in the relations between man and man, the worst that can happen to one is to find himself at the other's discretion."²⁹ Where Rousseau was referring the vertical relationship between ruler and ruled, however, we here apply it to a

²⁹ Jean-Jacques Rousseau, *Discourse on the Origin of Inequality*, in Victor Gourevitch (ed.), *Rousseau: 'The Discourses' and Other Early Political Writings*, Cambridge University Press (1997), at 176. Where this particular translation uses 'discretion', others use the more evocative 'live at another's mercy'.

primarily horizontal relationship ('primarily' rather than 'wholly', for reasons we shall shortly discuss). The lack of material resources is neither a necessary nor sufficient condition of such horizontal unfreedom: we side neither with liberals such as Rawls and Berlin, nor with the Marxist Cohen. It is, however, one amongst many sets of circumstances which have the potential to give rise to a horizontal relationship of domination and, perhaps, in a time where the political orthodoxy is neo-liberal - where progressively more is privately owned, and ownership brings with it fewer restrictions on what one can do with it - the most important such set of circumstances.

4.5.3 Neo-republican freedom and poverty: two lessons

We can elaborate two conclusions about republican freedom and material deprivation. The first is that absolute poverty is not itself, a source of unfreedom; absent another party who has relevantly more - that is, not just more, but more in a way which by reason of its quality or quantity permits arbitrary interference - the relational nature of the ideal means it does not bite. We are not dealing with a cheap synonym for material sufficiency: republican freedom's relationality brings insufficiency within its scope as a relevant consideration where liberal freedom in its most influential form excludes it, but does not colonise that terrain, and so is more subtle than an analysis which takes material factors as its sole consideration. Wealth, being a central axis along which social relations operate, is relevant to freedom, but so is much else.

The flipside of this is that even where the deprivation is not absolute - where the individual in question can meet his or her basic needs - but merely relative, material inequality nevertheless renders unfree where it permits a party with greater resources to arbitrarily interfere with the interests of one with lesser resources.³⁰ Not all relative inequality will meet this condition. It is unlikely that, despite the disparity of wealth, a billionaire will, on the basis of his greater wealth, be able to interfere with the interests of his (merely) millionaire acquaintance for any reason or for none. Much relative inequality will fall within this category, however, and so one's economic resources can be constituted as a contributory factor to a relationship of domination notwithstanding that the deprivation is not, even nearly,

³⁰ For a bald statement of a similar idea, see Stuart White, *The Republican Critique of Capitalism*, (2011) 14 Critical Review of International Social and Political Philosophy 561, at 567.

absolute. The closer it comes to absolute deprivation, of course, the easier such interference will be: the potential for interference, like the severity of the potential interferences, grows as the person subject to it approaches the breadline - as the person whose interests are being interfered with struggles to meet basic needs of sustenance and shelter - but material factors will be relevant to freedom elsewhere.

The republican ideal of non-domination therefore finds in questions of wealth an acute point of analytical divergence from a negative freedom which claims for itself the grandeur of the pursuit of freedom yet places problems of wealth and inequality out of sight and out of mind or, at best, gives them a secondary status. An endorsement of the non-domination ideal goes some way to healing the cleavage which exists between issues of freedom and those of equality and opens up a space for the pursuit of the latter within a project whose overall aim, and guiding principle, is the former.

4.5.4 Equality and freedom

Much recent economics literature has attempted to demonstrate that inequality is bad for the social body along a variety of axes, even where, in absolute terms, wealth is higher; that there are good reasons for pursuing equality at the cost of wealth, and so it is rational to want to live in a poorer but more equal society than one which is wealthier as a whole but in which the division of that wealth is less equal.³¹ Any such argument eventually runs up against the prevailing logic of liberty and the autonomous individual, with which any attempt at achieving a more egalitarian distribution of income is presumed incompatible, such that any form of redistribution can be justified only on the basis of another good that must by definition be hostile to freedom and so is absent in the more strident advocates of liberal freedom who are influential within neo-liberal and libertarian movements. The forgoing argument counters this claim with the suggestion that the liberty supposedly at issue provides only an incomplete solution to this problem and that, by the republican standard, unequal societies in fact encourage the proliferation of unfreedom, for where there exists significant

³¹ Richard Wilkinson and Kate Pickett, *The Spirit Level: Why Equality is Better for Everyone*, Penguin (2010); Joseph Stiglitz, *The Price of Inequality: The Avoidable Causes and Invisible Costs of Inequality*, Allen Lane (2012).

inequality, it is likely that one section of society will dominate another.³² It offers another reason to pursue a fairer division of wealth rather than maintain a misleading and unhelpful focus on crude aggregate measures of wealth such as GDP in evaluating the success of a society.³³ From a perspective which not only admits but in fact prizes the situation of the isolated individual equality must necessarily be a separate and incompatible goal. Neo-republican thought marries in a loose, yet achievable, fashion the two goals.

An earlier discussion of the role played by the rhetoric of freedom within neo-liberal discourse noted that the consistent effect of measures taken to promote freedom has been to encourage material inequality and the transfer of wealth from the bottom of society to the top. Neo-liberalism, more than any other political outlook is therefore reliant for its coherence and its plausibility on the claim that wealth - both relative and absolute - is of no relevance to questions of freedom; that its effect upon the distribution of wealth does not undercut its rhetorical foundations. The foregoing account challenges this twice over: firstly by demonstrating that the relationship between money and freedom is more direct than is normally acknowledged - that the distribution of wealth is capable of reducing freedom rather than merely conditioning its exercise - and in the claim that, by promoting greater inequality, neo-liberal regimes work against their own rhetoric: rather than promoting freedom, they encourage unfreedom.

4.6 Property and freedom

This account falls foul, however, of the warning delivered earlier, which drew attention to the possibility that to challenge certain claims or presuppositions of neo-liberal thought is to implicitly accept everything logically prior to them - to conduct the argument on territory chosen by one's opponent. In the current discussion, that danger is demonstrated by the fact

³² Inequality is most widely measured by means of the Gini coefficient, a statistic which measures the variation in a distribution of values: 0 is the lowest inequality (where all incomes are equal) and 1 the highest (where one party receives all the income). The Institute for Fiscal Studies notes that the rise in the Gini coefficient under Thatcher ("from around 0.25 in 1979 to a peak of around 0.34 in the early 1990s") was "unparalleled in recent British history." As of 2010-11, it stood at 0.34: Jonathan Cribb, Robert Joyce, David Phillips, *Living Standards, Poverty and Inequality in the UK: 2012*, The Institute for Fiscal Studies (2012), at 36-7.

³³ Periodically, attempts are made to identify a more meaningful way to measure social progress. One examples is the Fordham Index on Social Health, which measures 16 key indicators including child poverty, unemployment, homicides and income inequality in order to measure the 'wellbeing' (scored out of 100) of American Society. The United Nations Human Development Index (UNHDI) measures life expectancy, income and education.

that in proffering an alternative interpretation of the relationship between a given distribution of property and freedom, we have tacitly accepted the existence of private property as an institution, without considering its own relation to freedom.³⁴

A belief in not merely the compatibility of private property with freedom but the existence of an unbreakable bond between them is the mainstream position within political philosophy today. This is true most obviously of those who are economically conservative. The libertarian Murray Rothbard, for example, holds Berlin to have erred in his definition of negative liberty, the “fundamental flaw” being that of having failed “to define negative liberty as the absence of physical interference with an individual’s person and property, with his *just property rights* broadly defined,” an error which permits Berlin to attack “pure and consistent laissez-faire libertarians as Cobden and Spencer on behalf of such confused and inconsistent classical liberals as Mill and de Tocqueville.”³⁵ Hayek states that private property is “an essential condition for the prevention of coercion, though by no means the only one... [it is] the first step in the delimitation of the private sphere which protects us against coercion.”³⁶ But the centrality of private property is equally true at the other end of the political spectrum: even Rawls’ position, anathema to those of a libertarian tendency for its redistributive elements, is explicitly characterised as an argument for a ‘property-owning democracy’, where the first of the two principles of justice which Rawls contends would be agreed upon from within the original position is that “each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others.”³⁷ This suite of liberties includes amongst its number “the right to hold personal property.” Justice demands freedom, of which property is a fundamental part - being one of the basic liberties, it takes

³⁴ The present discussion considers the general justification of property only in the context of freedom. See also Bentham, who makes a utilitarian case for property, based on the ‘established expectation’ it protects: “I cannot count upon the enjoyment of that which I regard as mine, except through the promise of the law which guarantees it to me. It is law alone which permits me to forget my natural weakness. It is only through the protection of law that I am able to inclose a field, and to give myself up to its cultivation with the sure though distant hope of harvest.” Jeremy Bentham, *The Theory of Legislation*, Routledge (1931), chapter 8; and Hegel, who makes it an aspect of personality and self-development: “The rationale of property is to be found not in the satisfaction of needs but in the supersession of the pure subjectivity of personality. In his property a person exists for the first time as reason. Even if my freedom is here realizes first of all in an external thing, and so poorly realized, nevertheless abstract personality in its immediacy can have no other existence save on characterized by immediacy” G.W.F. Hegel, *Outlines of the Philosophy of Right*, Oxford University Press (2008), at 58. Waldron groups Bentham and von Mises together with Aristotle as ‘utilitarian’ in their arguments for private property, and Hegel alongside Locke, Dworkin, Nozick and Rawls: Jeremy Waldron, *The Right to Private Property*, Clarendon Press (1988), at 5-16.

³⁵ Murray N. Rothbard, *The Ethics of Liberty*, Humanities Press (1982), at 216-7.

³⁶ Friedrich Hayek, *The Constitution of Liberty*, University of Chicago Press (1960), at 140.

³⁷ Rawls, note 16, at 60.

priority over the second principle of justice (the difference principle) - and so the infringement of property “cannot be justified, or compensated for, by greater social and economic advantages.”³⁸ It is in this sense that Rawls is more accurately characterised as *pre*-distributive: once established, property holdings can be limited only on the ground of liberty itself, and material deprivation to reduce freedom.

The distinction to be drawn between what Gaus has called ‘modern’ liberals on one hand and classical liberals, neo-liberals and libertarians on the other is to be found not in the identification of protection of property as one of the duties of the state, but in the extent to which these rights can be required to make way in pursuit of, e.g., the elimination of poverty: the former permits it while neither of the latter three would.³⁹ When liberal thinkers seek to protect freedom by preventing interferences with individual interests, then, the interests in question invariably include private property prominently among them.⁴⁰ As a correlate, one of the legitimate forms which state interference can take in both liberal thought and even for theorists of the minimal state is to interfere so as to protect property rights: only in what we earlier termed an ultra-minimal state - one in which the protection of property was entrusted to market mechanisms in a state of competition between multiple private protection associations - would this represent an overreach of public power, and it is Nozick's position that such an ultra-minimal state would evolve, inevitably, into the minimal state he himself endorses.⁴¹ Certainly, no such thing exists in what is still sometimes called the developed world.

What we might call capitalist freedom - a position encompassing neo-liberal, libertarian and anarcho-capitalist thought - therefore necessarily rests upon a vision of the world in which private property is central, distinguishing voluntary exchange by free and formally equal individuals from interference with private property by the state.⁴² Without persons A and B

³⁸ Rawls, note 16, at 61

³⁹ See the discussion in Philip Pettit and Chadran Kukathas, *Rawls: A Theory of Justice and Its Critics*, Polity (1990), at 74.

⁴⁰ An interesting exception is Berlin himself: he does not include the right to property in his catalogue of fundamental rights and elsewhere indicated that he did not support the existence of such a right: see Galipeau, note 13, at 128-9, note 32.

⁴¹ Nozick, above, note 9, at 113-5.

⁴² This provides the link between classical liberalism and its modern variants, and so ensures the on-going relevance of some of the most acute critiques of liberalism in its earlier form, including that of Polanyi: “With the liberal, the idea of freedom thus degenerates into a mere advocacy of free enterprise...This means the fullness of freedom for those whose income, leisure and security need no enhancing and a mere pittance of

owning certain things which they desire to exchange, they cannot consummate their capitalist freedom. If the decision to exchange is in the hands of anyone other than private individuals acting in a private capacity (though not necessarily alone) then the decision is unfree to that extent. Property is freedom, and the protection of property is the protection of freedom.

4.6.1 Property and unfreedom

And yet, as G.A. Cohen has pointed out, the very existence of private property implies a standing willingness to violate freedom: a commitment to the sort of interference which is supposed to be ruled out by the embrace of capitalist freedom and which is the very opposite of the mechanisms of voluntary capitalist exchange. Starting from a non-moralised conception of freedom (“I am *pro tanto* unfree *whenever* someone interferes with my actions whether or not I have a right to perform them, and whether or not my obstructor has a right to interfere with me”) that is immediately recognisable as what we have called ‘liberal freedom’, he considers the issue of property in land, noting:

“The government certainly interferes with a landowner’s freedom when it establishes public rights of way and the rights of others to pitch tents. But it also interferes with the freedom of a would-be walker or a tent-pitcher when it prevents them from indulging *their* individual inclinations.”⁴³

The effect is to make clear that interferences with private property - paradigmatic of an invasion of freedom under the rubric of capitalist freedom - “which *reduce* owners’ freedom by transferring rights over resources to non-owners thereby *increase* the latter’s freedom,” and so “the net effect of freedom on the resource transfer is... therefore, in advance of further information and argument, a moot point.”⁴⁴ This is a corollary of the point we earlier identified in his work: that we can pay to overcome or to remove potential interference, we now see, is only because property involves such interference. The logic is obvious, but the

liberty for the people, who may in a vain attempt to make use of their democratic rights to gain shelter from the power of the owners of property.” Karl Polanyi. *The Great Transformation*, (2nd ed.) Beacon Press (2001), at 257. Polanyi’s desire to regulate and control, however, takes for granted private property, seeking to justify limits upon it rather than re-examining its very basis. Given the radicalisation of the rhetoric of freedom in contemporary political discourse, the latter task is of greater import than the former.

⁴³ Cohen, *CFP*, note 23, at 151-3.

⁴⁴ Cohen, *CFP*, note 23, at 151.

consequences of taking this step backwards are significant. On this basis, Cohen rejects the labelling of interference with property ‘interventionist’; all property implies intervention and to suggest otherwise “is an ideological distortion detrimental to clear thinking and friendly to the libertarian point of view.”⁴⁵ This strikes at the heart of capitalist freedom, represented here by the assumption that non-interference is upheld where private property is respected by the state *and* non-owners are obstructed in their attempt to use property that is not recognised as their own: this cannot be true, for the latter (supposedly mandatory) is as much an interference as the former (which is deprecated).

Cohen’s account is correct, but implies a concept of property which must be made explicit. The effect of a private law right or duty - like a right of ownership over property - is to place the public power, and its coercive apparatus, at the service of one individual in relation to another. It is therefore impossible in the state of nature, such rights coming into being only where there is a system of public power and an associated body of rules (i.e., law) for determining its deployment. We need the state, or something like it, if we are to distinguish *meum* from *tuum*, and to know what follows from the distinction. And, of course, once there exists public power to act as a backstop to private relationships, the capacity of one to interfere arbitrarily with the interests of another is multiplied many times over. The delegation of public power takes two forms: the first is that exemplified by the criminal law which implies the direct intervention of public power *in the name of the public*. Of more interest here is the delegation of the public power inherent in private law - here the delegated power is exercised by the party who enjoys whatever rights in law for any reason or for none, and even where to do so is contrary to the public interest. In the case of property the power which stands behind the property owner takes both forms. The criminal law punishes theft, some sorts of damage etc: actions which done by the person recognised as owner would be lawful, when done by others meet with obstruction, interference and punishment. Similarly, private law rules such as those on trespass put at the owner’s disposal the coercive apparatus necessary to vindicate his or her rights (within the limits recognised by law) - again in a manner which entails interference with others. In both cases, those liable to encounter the coercive apparatus of the state are those not recognised as owners, and so Cohen, quoting Marx, notes that “private ownership by one person presupposes non-ownership on the part of other persons”; not just some other persons though - private property rights in fact apply

⁴⁵ Cohen, *CFP*, note 23, at 151-2.

against all others, who by virtue of their status as non-owners become potential subjects of state interference.⁴⁶

4.6.2 Property as interference

The very recognition of private property is therefore founded upon a willingness to interfere with the interests of some persons and not others: it functions according to the logic not of non-interference - as the rhetoric of capitalist freedom suggests - but of differential interference. The institution of private property can for this reason be conceptualised as the system of rules which distinguish, in relation to goods, those whose attempts to exploit them will be interfered with by public power, from those whose attempts will not. And much as the interference with non-owners protects the freedom of the owner, interference with the owner's interests can augment the freedom of non-owners. Private property thus implements the sort of freedom-redistribution which was discussed in chapter 2: where public power acts to protect the interests of the owner, it reduces that of the non-owner and vice versa. The recognition of private property rights is not neutral in terms of liberal freedom, for its recognition implies a willingness to interfere: the distribution of property is simultaneously the distribution of non-interference - in liberal terms, of freedom. Property is freedom for some and unfreedom for others.⁴⁷

The maximisation of freedom as non-interference therefore cannot demand, without further elaboration, that the property rights of the owner be respected and protected, for the very existence of those rights is freedom-reducing from the point of view of non-owners to the extent that it is founded upon a standing willingness to interfere. If we are to retain the precept of capitalist freedom that freedom is promoted by the respect of private property rights, then we must augment the account: the overlap of the logics of freedom and property demands a distinction between the freedom of the owner and the freedom of the non-owner if the fundamental relation between property and freedom is not to be totally undermined. Why does the interference with an owner reduce freedom and that with a non-owner not?

⁴⁶ Karl Marx, *Capital: Volume 3*, Penguin (1981), at 812, quoted in Cohen, *CFP*, note 23, at 150.

⁴⁷ Waldron seems to agree: Jeremy Waldron, *Homelessness and the Issue of Freedom*, (1991) 39 UCLA Law Review 295.

That property implies interference is of course less problematic for neo-republicans: liberal freedom holds all interference to be freedom-reducing, where neo-republicanism is concerned only with those which are arbitrary. The non-domination ideal cannot therefore legitimate a priori the institution of private property, because the interference such a system implies is neither ‘good’ nor ‘bad’ per se: it can speak only to a given distribution of property, judging whether that distribution (and the willingness on the part of the state which secures it) is or is not arbitrary and the capacity for interference therefore freedom-reducing or not. If the fact of being an owner/non-owner was sufficient to render interference with the latter (always) and with the former (never) non-arbitrary, then the republican regime would accept the interference implied by the private property, providing an effective legitimisation of the status quo and lining up commonplace liberal and republican verdicts on property notwithstanding the discrepancy between their respective normative standards. We shall consider shortly whether this is the case, having first examined how those who promote non-interference draw the distinction.

4.6.3 Moralising interference

The problem is to explain why, starting from a commitment to liberal freedom, interference with owners (confiscation, for example) is unacceptable while that with the non-owner (such as, say, criminalising theft) is not. Cohen suggests that libertarian writing attempts to resolve the matter with a ‘rights definition of freedom’, whereby “I am unfree only where someone [here, the state], prevents me from doing what I have a right to do,”⁴⁸ and quotes Nozick: “Other people’s actions place limits on one’s available opportunities. Whether this makes one’s resulting action non-voluntary depends upon whether these others had the right to act as they did.”⁴⁹ This would seem to distinguish state interference which is illegitimate (interference with property to which people have a right) and that which is legitimate (that which stops people from gaining access to or exploiting property to which they have no right.) An account like this puts to an end to the myth of capitalism (and, more specifically, neo-liberal society as the contemporary paradigm of capitalist development) as generalised non-interference, for we are no longer talking about the same neutral conception of non-interference from which we started, but a highly moralised one, intimately bound up with the

⁴⁸ Cohen, *CFP*, note 23, at 153.

⁴⁹ Nozick, note 9, at 262, quoted in Cohen, *CFP*, note 23, at 153.

distribution of property. Instead, when the state does as it should, freedom as non-interference, rather than being a general feature of capitalist society, correlates with property: those who have it are not interfered with and those who do not are everywhere obstructed in their efforts to access it. The have-nots encounter constant obstruction from entering upon, or making use of, or otherwise engaging with, the property of others, but that interference is legitimated away via the device of moral rights in order to sustain the rhetoric of capitalism as freedom. Property determines the position of the line between interferences which reduce freedom and those which do not.

4.6.4 Moralising ownership

Even this more limited claim about freedom - that only interferences with that to which one has a moral right reduce freedom - is tendentious. Cohen accuses libertarians of inconsistency: the rights in question seem to be moral rights, such that, the owner having a moral right to his property, an interference with his enjoyment of that property is illegitimate, while a non-owner, not enjoying such a moral right, can and indeed must, encounter interference when attempting to make use of others' property, this latter interference being one of the fundamental functions of the state. Yet libertarians are unwilling to consider the moral status of interferences with private property, which are ruled illegitimate regardless of any moral justification which might be available: the invocation of the moralised conception of freedom as non-interference works in only one direction, supporting existing property owners but never working to the benefit of non-owners.⁵⁰ In the absence of a coherent account of why owners have a moral right to their goods but non-owners do not, then we are left to fall back on a positivistic account which makes the moral right dependent on a prior legal right: an owner has a moral right to his or her property *because* he or she is the owner. No more is needed.

4.6.5 The insufficiency of legality

Our problem is not, however, resolved by such a shift from moral to legal rights as the feature which distinguishes between legitimate and illegitimate interferences. Where public power interferes with the rights of an owner and that interference meets a minimum condition of

⁵⁰ Cohen, *CFP*, note 23, at 153.

legality, then the legal right which was the basis of the moral right will disappear - one will be reduced, in effect, to arguing about the interference with one's property right over a thing one no longer owns - and the moral right (if it correlates with ownership) is extinguished with it. If the moral right survives the lawful deprivation, then there can be no morally legitimate deprivation. It might be replied that in such a case the moral right is to a thing that one once owned and of which he or she was deprived illegitimately: this is circular - the deprivation is illegitimate because the thing of which he or she was deprived is something over which he she retains a moral right *because the deprivation was illegitimate*. Falling back upon legal rights takes us no closer to solving the problem of legitimating interference with non-owners (so as to exclude it from the category of freedom-reducing interference) while assessing as illegitimate the interference with an owner's rights over property: the classical liberal position on property seems unsustainable, and republican perspectives have no reason to consider the interference inherent in property to be anything other than arbitrary. We must return to take seriously the task of identifying a stand-alone moral account of the relevant distinction between owner and non-owner which is not parasitic upon the legal recognition of ownership: a final attempt to save a worldview in which the protection of private property is central to freedom, now understood as moralised non-interference, rather than mere non-interference.

4.7 Acquisition and transfer

Libertarian thinkers, like liberals before them, take to offering a potential means of giving moral approval to a given distribution of property through the concepts of just acquisition and just transfer. The father of all such accounts is Locke who, arguing against Filmer's account of all private property as deriving from a divine Monarch on whom God had bestowed it and on whom the property rights of his subjects depended,⁵¹ nevertheless agreed with Filmer that the original divine grant was to Adam. Where they diverged was in Locke's insistence that property was not the private dominion of Adam - a dominion which Filmer held to have descended to the kings of his day. Instead, in his grant "God gave him... right in common with all mankind."⁵² This common property does not preclude the creation of private property

⁵¹ "This lordship which Adam by creation had over the whole world, and by right descending from him the patriarchs did enjoy, was as large and ample as the absolutest dominion of any monarch which hath been since the creation" Robert Filmer, *Patriarcha*, in J.P. Sommerville (ed.), *Filmer: 'Patriarcha' and Other Writings*, Cambridge University Press (1991), at 7.

⁵² John Locke *Two Treatises on Government*, in Peter Laslett (ed.), *Locke: Two Treatises on Government*, Cambridge University Press (1988), at 157.

rights - God gave men the world and its contents for the “support and comfort of their being” and so “there must of necessity be a means to appropriate them some way or other before they can be of any use, or at all beneficial to any particular man.”⁵³ The solution to this conundrum is found in self-ownership which stands now, as then, at the heart of liberal thought⁵⁴ - the idea that “every man has a property in his own person,” and so to his own labour and its fruits.⁵⁵ The eventual effect is that one’s labour is capable of transforming what belong to all in common into something which belongs to one alone:

“Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property... it hath by this labour something annexed to it, that excludes the common right of other men: for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to.”⁵⁶

This possibility of obtaining a right to private property is subject to the ‘Lockean proviso’ - that one can acquire property only where “there is enough, and as good left in common for others.”⁵⁷ When a Lockean argument for just acquisition is made by Nozick, however, the proviso takes the weaker form that “[a] process normally giving rise to a permanent bequeathable property right in a previously unowned thing will not do so if the position of others no longer at liberty to use the thing is thereby worsened”⁵⁸: here, all other ways in which the position of the non-owner might be worsened are of no relevance - most

⁵³ Locke, note 52, at 286-7.

⁵⁴ E.g., Locke, “Every man has a property in his own person. This no body has nay right to but himself,” Locke, note 52, at 287; Nozick, “most patterned principles of distributive justice [which judge the distribution of property on the basis of outcome rather than process] institute (partial) ownership by others of people and their actions and labour. These principles involve a shift from the classical liberals’ notions of self-ownership to a notion of (partial) property rights in *other* people.” Nozick, note 9, at 172. I will not consider the merits of the claim that one owns oneself, though to reject it implies the rejection of the labour theory of acquisition. For discussion of its plausibility as the basis of a process of original acquisition, see Waldron, note 34, at 177-91 and 398-408. See also G.A. Cohen, *Self-Ownership, World Ownership, and Equality*, (1986) 3 *Social Philosophy and Policy* 77.

⁵⁵ Locke, note 52, at 287. Nozick holds that self-ownership implies the possibility of selling oneself into slavery. Nozick, note 9, at 331.

⁵⁶ Locke, note 52, at 288.

⁵⁷ Locke, note 52, at 288. The proviso is normally understood as providing the primary restriction upon the process of acquisition, but Jeremy Waldron has argued that such would be inconsistent with the duty of self-preservation because in conditions of scarcity, there can *never* be enough and as good left for others. Instead, the limit is the much stronger restriction imposed as necessary by the legislature in political society. See Jeremy Waldron, *Enough and as Good Left For Others*, (1979) *The Philosophical Quarterly* 319.

⁵⁸ Nozick, note 9, at 178.

importantly, that which prevents legitimate acquisition of said acquisition would not leave sufficient common property for others that follow. The ability to become the moral owner of property with which one has mixed one's labour survives subject to this weaker limit. One republican response to the process of original acquisition is particularly well-known: "How many crimes, wars, murder, how many miseries and horrors Mankind would have been spared by him who, pulling up the stakes or filling up the ditch, had cried out to his kind: Beware of listening to this imposter, You are lost if you forget that the fruits are everyone's and the Earth no one's."⁵⁹

4.7.1 Historical entitlement theory

This principle - the principle of justice in acquisition - combines with a second, curiously undefined, principle of justice in transfer⁶⁰ to produce a 'historical entitlement theory' of justice in distribution, focusing not on how property is distributed at a given point in time but on the process by which that distribution was arrived at:

"A distribution is just if it arises from another just distribution by legitimate means. The legitimate means... are specified by the principle of justice in transfer. The legitimate first 'moves' are specified by the principle of justice in acquisition. Whatever arises from a just situation by just steps is itself just. The means of change specified by the principle of justice in transfer preserve justice."⁶¹

Even, then, if it were accepted by libertarian thinkers that private property implies interference with non-owners along with the better advertised freedom of owners, the entitlement theory demonstrates how that distribution of interference might be morally justified by resulting from just acquisition and just transfer: it solves the problem of drawing

⁵⁹ Jean-Jacques Rousseau, *Discourse on the Origin of Inequality*, in Victor Gourevitch (ed.), *Rousseau: 'The Discourses' and Other Early Political Writings (vol. I)*, Cambridge University Press (1997), at 161.

⁶⁰ Waldron suggests that "it will legitimize the sort of transactions described in the famous Walt Chamberlain example... and also familiar procedures like sale and purchase, gift, donation, and bequest; it will legitimize what we regard broadly as market transactions; and it will have something to say about thorny topics like fraud, negotiability formal requirements of deed and contract, implied warranties and conditions, and so on." Waldron, note 33, at 258. For the Walt Chamberlain example see Nozick, note 9, at 160-4. For an important critique, see Barbara H. Fried, *Wilt Chamberlain Revisited: Nozick's 'Justice In Transfer' and the Problem of Market-Based Distribution*, (1995) 24 *Philosophy and Public Affairs* 226.

⁶¹ Nozick, note 9, at 151.

a bright line between owners and non-owners such as to justify the assertion that interferences in each category reduce and do not reduce freedom accordingly. This account wraps up legitimate freedom and unfreedom in a causal rather than merely correlative relationship; the unfreedom of a non-owner is legitimate *because* the owner is free to acquire and dispose of his property as he sees fit. Were he not, there would be no justice in transfer, the present distribution of property would be unjust and the moral appropriateness of the distribution of interference unravelled. Transposed into neo-republican terms, whereby we are required to diagnose not the moral appropriateness of the interference, but instead the arbitrariness of the potential interference and so the underlying distribution of property to ascertain whether the interference will take place on an arbitrary basis and therefore reduce freedom, an account which justifies that distribution in terms of the efforts of individuals and their free choices is similarly attractive. It potentially pronounces the entire distribution of wealth and entitlements, at a stroke, non-arbitrary and in doing so legitimates not just the institution of private property, but also its contemporary arrangement.

4.7.2 Freedom in an owned world

The present day individual stands far removed from the context in which just original acquisition might occur, being embedded in a context in which almost everything is already owned; where people, countries and companies enjoy the fruit of unjust original acquisitions compounded over decades and centuries, and the neo-liberal project has seen a drastic reduction in the range of assets held in public hands. Were we to return to an egalitarian baseline, were it possible to start over with the sum total of wealth distributed evenly between every individual on the planet, this libertarian fantasy might begin to make sense. But such a thing is not possible, and in conjunction with the evident injustice (or even dubious justice) of original acquisitions,⁶² it is neither practicable nor sensible to ignore the disparities in wealth between individuals and pretend that any transaction between them can be considered to result in a just distribution of wealth merely on the basis that it reflects their free will: even if consent is unvitiated, the transfer of an unjustly acquired asset cannot itself be just. A forward-looking justification of property holdings requires an impossible investigation into

⁶² A classic example might be the process of enclosure by which land over which the populace had traditional rights of use was transferred into private ownership: see E.P. Thompson, *The Making of the English Working Class*, Pelican (1991), describing the process of enclosure as "a plain enough case of class robbery, played according to fair rules of property and law laid down by a Parliament of property owners and lawyers" (at 218).

the genesis of current patterns of distribution which, even it were possible, would not show us what we would need to see if the entitlement theory were to justify those patterns. The possibility of employing the entitlement theory to justify an actually-existing social distribution of property is zero.⁶³

4.7.3 Paradoxes of freedom and property

Not only, then, do libertarian positions fail to acknowledge that existence of private property, in the sense of private ownership of goods and land which is recognised in law, and which will, if necessary, be backed up by the coercive resources of the state, represents a pervasive form of interference with individuals - mostly latent but entirely dependable in its willingness to exercise actual interference. They neglect that such interference far outweighs the, supposedly illegitimate, form of potential interference against which libertarianism sets its stall, for the individual ownership of one person is a corollary of the non-ownership of all others, an attempt by any of whom to make use of whatever property is at issue will be to put himself on the wrong side of public might. Even where this latter interference is acknowledged, the difficulty of establishing a useful normative basis for distinguishing between the interference which we hold legitimate and that which we cannot countenance demonstrates the dubiety of the commitment to freedom - a commitment placed under further strain by a shift of perspective from the existence of private property back to the question of how such property is distributed within society: the non-interference ideal finds itself supporting property rights even where the effect to condemn non-owners to live at the mercy of owners.

Absent a redistributive moment - a situation of radical redistribution of property on egalitarian grounds which might set aside the injustice of historic acquisition and provide a basis for a forward-looking entitlement theory underpinned by justice in transfer - we are left to proceed on the basis of an incremental redistribution through taxation (much of it resisted by those, often themselves possessed of vast wealth, who speak the language of freedom, whether neo-liberal or libertarian by tendency) and, otherwise, voluntary transaction between formally equal individuals. Even in a world where the distribution of property is hopelessly

⁶³ For a recent argument to that effect, see Jeremy Waldron, *The Rule of Law and the Measure of Property*, Cambridge University Press (2012), at 28-43. Even Nozick seems to agree: note 9, at 230-1.

skewed, the mantra of consent becomes the justification for the interference that stands behind both property and the contractual arrangements which alter its distribution. The fact of state interference at the level of contractual enforcement is excluded from the category of freedom-reducing actions action because it is consented to; so too the pattern of interference with owners and non-owners which results from the transaction executed. Chapter 6 will consider the plausibility of employing consent as the basis of the distinction between arbitrary and non-arbitrary interference, and so giving it within the neo-republican project a curative status equivalent to its legitimating function in liberal thought. If property implies interference, can the fact of consent in the transfer of that property prevent the interference from being freedom-reducing?

4.8 Property and freedom in the republican revival

The relationship between property as an institution and neo-republican freedom has not yet been the subject of sustained analysis. Pettit has, however, made two related claims about property and freedom:

“The first is that the property system and property distribution envisaged, however inegalitarian, is not inimical to freedom just on the grounds of being inegalitarian. The second is that if the property system or distribution has the contingent effect of allowing domination, then that makes a case for institutional adjustment, assuming that some beneficial adjustment is available.”⁶⁴

On both counts, this is compatible with the account presented. It is a weaker claim, however, specifically because in starting from the question of an inegalitarian distribution of property, Pettit has already accepted that private property is not an a priori source of domination, much as he accepts the instrumental (if not intrinsically moral) value of the market in distributing that property. The second claim is again unhelpfully weak: if the contingent domination merely provides a non-exclusionary reason (to be weighed against what? Respect for the outcome of market processes?) for adjusting the distribution of property, then in what sense is this a neo-republican argument? The seeming willingness to abandon the pursuit of non-

⁶⁴ Philip Pettit, *Freedom in the Market* (2005) 5 Politics Philosophy Economics 131, at 139

domination is in part explained by the account offered of the nature of property, to which Pettit seems to ascribes a natural, pre-legal existence:

“The property regime can have the aspect of an environment akin to the natural environment. Like the natural environment, it will certainly affect the range or ease with which people enjoy their status as undominated agents, and it may warrant complaint on that account, but it will not itself be a source of domination.”⁶⁵

This is an unfortunate analogy which accords to the existing distribution of wealth and entitlements a status of which it is wholly undeserving. Without even looking ‘behind’ the property regime to examine the process by which it was created, we can say with some certainty that it was created. Rules as to what will be recognised as property, which contracts will be enforced and what remedies will be available for their breach - all this was decided at some point, by judges, politicians, whoever, and in a way to which the minor adjustments human beings are capable of making to their physical environment cannot compare. This comparison echoes the most outrageous fallacies of liberal legalism in its potential to obscure the injustices of original acquisition, long histories of unjust transaction and the political consequences of the distribution of property. It is, intentionally or not, a tool of massive depoliticisation. The property regime is neither static and predictable (as the environment normally is) nor essentially random (as when the natural world intrudes into human life in the form of a volcanic eruption or a tidal wave), because it is tied up with human agency, by turns vexatious or capricious, or even altruistic, but subject to a thousand motivations unavailable to the natural world: we may live at the mercy of the natural world, but this means something very different from living at the mercy of another human being. The property regime neither arose spontaneously nor did it evolve to become as it is: it was pushed and pulled at every turn, manipulated by actors with interests of their own. Wealth has a tendency to self-perpetuate, whereby practices of regulatory capture or of monopoly capitalism (to which, it might be argued, ‘normal’ capitalism has an undeniable propensity), meaning that those who derive advantage from it are likely to find greater advantage accrue to them over time. Pettit’s failure to recognise this leads him to adopt a republican variant of the conclusion reached by Berlin and Rawls, whereby property affects the value of rather

⁶⁵ Pettit, note 64, at 139.

than the existence of freedom: “it reduces the range or the ease with which you enjoy freedom as non-domination” as do “natural differences of physique or intelligence or geography.”⁶⁶ Such differences are those normally considered to result from ‘brute luck’⁶⁷ and to compare a historically conditioned property regime with these factors is alarming sophistry. Pettit’s account is to that extent incorrect. Property, it has been shown, does not itself affect freedom. Indeed, its recognition is part of a process by which the existence of an organised public power protects some against the arbitrary interference by others. Where the imbalance in its distribution is such that property holdings facilitate the arbitrary interference by one of another, however, it is not the value of freedom which is diminished: it is its existence.

We will return to the question of property and, eventually, consent in order to shed further light on the causes of horizontal unfreedom. We must first consider, however, the role of the law in the direct regulation of the relation between private individuals; the foreground to which property acts as a backdrop.

⁶⁶ Pettit, note 64, at 140.

⁶⁷ Brute luck is “a matter of how risks fall out that are not in that sense deliberate gambles.” It is contrasted with option luck, “a matter of how deliberate and calculated gambles turn out - whether someone gains or loses through accepting an isolated risk he or she should have anticipated and might have declined”: Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality*, Harvard University Press (2000), at 73.

Part 2 - Chapter 5: Marriage, Divorce and the Law

5.1 Horizontal relationships and freedom

This part 2 focuses on what I have identified as a crucial lacuna of the neo-republican revival - the sustained analysis of horizontal relationships of domination and, in particular, the role of public power in constituting those relationships. The horizontal relationships of unfreedom with which we concern ourselves are not, in the first place, those in which one party threatens to, or indeed does, transgress the law. Instead, we focus upon those in which one party dominates another, but the capacity for arbitrary interference is lawful; where the arbitrary interference in question can call upon the state, and the coercive apparatus which comes into being alongside an organised public power, to support it or, at least, receives the tacit endorsement of this public power, where it does not through sanction seek to indicate its disapproval or, moreover, prevent the interference from happening. It is therefore incumbent upon us to consider the way in which the law structures horizontal relationships - outlawing certain actions (such that the he who executes them puts himself on the wrong side of the law, and is liable to be punished), permitting other things (so that he who carries them out need not fear an encounter with public power) and making others mandatory (such that he who omits to carry them out is punished for his failure).

5.1.1 The choice of case studies

The state's role in horizontal domination has so far been explored only via the institution of property. We will return to the implications of property for freedom in horizontal relations. In the meantime, we consider other means by which public power conditions private relations; other aspects of private relationships which cannot exist in the absence of the state and for which, where they render unfree, the state must shoulder some of the blame: if property is the background, legal regulation of these relationships is the foreground. Two case studies have been chosen in order to illustrate the role of law in constituting horizontal relationships of domination and, in turn, how such relationships have been and might be further undone. The case studies in question relate firstly, in the present chapter, to the relationship between husband and wife and secondly, in the following chapter, that between employer and employee. Their selection can be justified in the following terms, relating both to the internal

logic of the present project and to the world of which it seeks to make sense. Firstly, the focus on each case study constitutes a response to two of the key criticisms discussed in the context of republican thought generally. In the first case, consideration of the husband-wife relationship constitutes a direct response to feminist critiques of classical republicanism, relating to the latter's disparagement or outright neglect of women, while attempting simultaneously to make good the failure of neo-republicanism to so far address directly the shortcomings of its predecessor. Most importantly, it acts as a direct response to Astell's critique of the manner in which freedom was articulated as a specifically male ideal, available to women, if at all, only where not in law subjugated by their husband or father. This is important analytically, but also symbolically: it is not sufficient to merely assert, as an abstract proposition, that neo-republicanism has something to say here. Whatever it is must also be said. In the second, an exploration of the employer-employee relationship addresses the problem identified whereby neo-republicanism often occupies the terrain of orthodox liberalism via an application of its ideal to a context in which liberalism and (another version of) republicanism once clashed. This permits the specific version of neo-republicanism advanced in the present work to strengthen itself via the appropriation of the conceptual resources of the labor republican movement, tying these together with my own reflections upon the relationship between freedom and money, and the role of public power in constituting property. In taking this relationship as our second case study of horizontal domination, this work is able to contend that neo-republicanism logically implies conclusions analogous to those arrived at by earlier republican thinkers (even where their normative bases diverge) and that neo-republican thought both can and must forge into areas which it has so far addressed only peripherally.

Secondly, the choice of case studies and, in particular, the fact of including multiple case studies where it might be thought that one would suffice, can be justified in terms of the fact that neither alone would demonstrate the progression of the argument being made and its full practical implications. In making the move from the first of these case-studies to the second, we expand our field of vision, so as to move, tentatively, towards a more general theory of horizontal domination - one based not upon the existence or potential existence of a specific legal relationship, but of how any person's relation to any other person may become, by virtue of the existence and intervention of public power, one of unfreedom. The relationality of the republican ideal has been the subject of repeated stress within this work: the choice and

ordering of case studies permits a move from the simplest of relationships - one to which there are only two parties, and the very existence of a relationship between them is a result of their own choice - via the more complicated situation in which that relationship may be coming to an end and it is necessary to contextualise the relationships of the parties to it to a variety of other actors, to a generalised, far more complex, set of actual and potential legal relationships whose aggregation reveals the status of the individual and answers in large part the question of his or her horizontal freedom. Such general applicability must be achieved if the fullest possible reach of the neo-republican ideal is to be arrived at. To reach the general, however, we must begin from the particular.

Thirdly, as has been observed in our account of their position in relation to republicanism as a historical tradition, our two areas of consideration fundamentally differ along an axis which makes it necessary to show how and why the neo-republican ideal applies equally to both. Where the history of female domination is in large part a history of discrimination - the application of different rules and standards to individuals depending on their gender - and so progressive emancipation could in part be achieved merely by undoing that discrimination, substituting rules of universal applicability, it has been shown that in the case of the labor republican movement and the triumph of certain liberal presuppositions which killed it off, formal equality became a central driver of domination. In juxtaposing case studies which exemplify both sides of this coin - domination via discrimination and domination without discrimination - we seek to establish the utility of the non-domination ideal in both contexts, and the manner in which that utility varies from one to the other. We aim in turn to demonstrate that applied to such horizontal contexts, the neo-republican ideal has a normative dimension discrete from and superior to that of equality alone.

Fourth, the choice of case studies can be justified on the basis of (albeit instinctive, impressionistic) beliefs as to the actual presence of unfreedom in contemporary society - beliefs as to how and why, as well as by whom, the average individual has found and continues to find his or her interests open to arbitrary interference. As will be seen, it is my thesis that the relationship between husband and wife has, from the point of view of neo-republican thought, improved considerably over time. It thus provides fertile ground for an analysis that, in showing how the law has been used to effect that advance, goes beyond mere condemnation to suggest the outlines of a neo-republican programme for further

emancipation in that context and in others. In the meantime, by virtue of the size of the relevant demographics alone, any residual unfreedom in this context is liable to apply to a vast proportion of the population. Even if the problem as it exists now is relatively minor as compared to the past, its application is extremely broad; if there is horizontal domination here, its victims are many. The second case study, we will see, is also a story of net improvement, but from the point of view of horizontal non-domination the law which structures the relationship between employer and employee has considerable room left for improvement. In fact, the balance of freedom and unfreedom would, for reasons which shall be explained, seem to be rolling back in recent years against the direction of travel witnessed through much of the twentieth century; undoing some of the progress whose logic and facts will be explained. Property, it has been shown, grounds horizontal domination and, at the broadest level, the employment relation between employer and employee can be understood as the relationship between those who have property and those who do not; those who sell their labour and those who buy it. It is for that reason perhaps the most significant of all the horizontal relationships of domination which might be identified as subsisting in the contemporary western world, and the changing nature of the employment relation has only exacerbated its inherently problematic nature. We therefore take it as our second case study.

In this context, another potential relationship of domination - one which can again be conceptualised as deriving almost directly from the fact of owning and not owning, and so is similarly entangled with the existence of public power - is sufficiently pervasive as to be a candidate for the sort of elaboration and analysis to which this and the following chapter are devoted: that between those who own property and those who do not. Prior to the 2008 crash, growth in many western economies was based in large part on spiralling housing costs which priced many out of the market and was compounded by planning laws which prevented demand from being met via construction of new properties. In Britain, those who could not afford to buy were squeezed from the other side by the selling off of social housing by Margaret Thatcher's Conservative government and the failure of successive governments to replace them. Many who might prefer to live in social housing are therefore are required instead to rent privately. In their immediate dealings with those from whom they rent, their dealings are structured by legal rules which lay down standard contractual terms, implicating the law in any relationship of domination which might subsist. The extent to which this confluence of legal factors might add up to a situation in which the propertyless live at the

mercy of property-owners is not the subject of any of our case studies, but given the numbers of individuals who fall into each category, as well as the fact that the wealth gap between them is still growing, it might well have been. It is likely that it is one of the primary forms of horizontal unfreedom in Britain today. Instead, within the present work, it is a relationship which becomes relevant principally as a backdrop to the employer-employee relationship, the need for the latter to pay for shelter in part necessitating the selling of his or her labour.

In short, the two case studies of horizontal domination that have been chosen work to bring the republican tradition full-circle in permitting the alignment of its most recent form with older and now largely neglected branches, and demonstrating that it has brought within its field of vision some of the tradition's most problematic blindspots. They evidence not just the fact of its application but also the range and depth of the neo-republican ideal as applied to man's relationship to man and the law which structures it.

5.2 Husband and wife

The relationship between husband and wife (or one partner and the other in a civil partnership) is, then, perhaps the most obvious example of a relationship which is directly constituted by law. Such relationship is paradigmatic because however else their relationship might be recognised (most likely from a religious perspective), two persons are husband and wife or civil partners only to the extent that the law recognises them as such. It is of interest for present purposes also because it has been, as we have seen, subjected to criticism from a non-domination standpoint. Though the relationship exists within a factual and legal matrix of almost infinite complexity, the limit to the number of parties directly implicated allows for the possibility of analysing it in some detail in order to understand the manner in which an alteration in the legal framework brings about an alteration in the bargaining position and, eventually, freedom of the parties involved. To facilitate diachronic analysis, our examples are drawn primarily from the Scots law of husband and wife, of which the following does not claim to be an exhaustive account.

5.2.1 Criminal law

An easy place to start is those variations of the criminal law which apply where the parties are husband and wife. In general, the effects are few. Previously, the most important was the rule that a husband could not rape his wife, a rule based on Hume's infamous statement that a "a man cannot himself commit a rape on his wife,"¹ seemingly influenced by Hale's assertion of the same fact on the basis that "by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."² Bit by bit, though more recently than is justifiable, the courts rolled back that rule, holding firstly that it did not hold where the couple were living separately,³ and later that the "fiction of implied consent has no useful purpose to serve today in the law of rape in Scotland."⁴ Though the impossibility of convicting a man for the rape of his wife did not preclude the possibility of convicting him for other offences, this embarrassing anachronism left an unacceptable gap in the protection of wives against possible domination by their husbands: we have said, and should repeat, that the law cannot reasonably be asked to shoulder the blame for horizontal unfreedom which derives from the unwillingness of certain parties to respect the boundaries which the law erects. The law can, however, and should, be criticized for its failure to put in place appropriate boundaries, such that the relevant interferences do not carry with them a meaningful risk of encountering the coercive apparatus of the state; where one can interfere at will with another's interests and receive the state's tacit endorsement in doing so. The current rule is contained within the Sexual Offences (Scotland) Act 2009, which responded to ongoing criticism that the common law offence of rape was one which reflected the male idea of sexual activity by significantly expanding the range of activities which are included within the actus reus.⁵ Not only is marriage no longer a defence to a charge of rape, but the potential basis of such a charge is now far wider; the state's coercive apparatus has clearly set its stall against such acts and whatever problems remain, it can no longer be said that the law signals to women that marriage requires them to live at the mercy of their husbands.

¹ Baron David Hume, *Commentaries on the Law of Scotland Respecting Crimes*, vol. I, at 305-6.

² Sir Matthew Hale, *History of the Pleas of the Crown*, (1736), vol. 1, at 629, quoted by Lord Lane CJ in *R v R* [1992] 1 AC 599 (HL), at 604.

³ *HMA v Duffy* 1983 SLT 7. The parties were not legally separated.

⁴ *Stallard v HMA* 1989 SLT 469, at 473.

⁵ Rape occurs when person A's penis, without either the consent of person B or the reasonable belief that B consents, "penetrates to any extent, either intending to do so or reckless as to whether there is penetration, the vagina, anus or mouth of B..." Sexual Offences (Scotland) Act 2009, s.1 (1).

5.2.2 The consequences of marriage

Elsewhere in the law, the consequences of marriage are greater. The rule, however, whereby a wife was under a duty to obey her husband has long since passed from this world, replaced by a relative equality that permits each to make most decisions independently of the other and prohibits the ‘reasonable chastisement’ of times past.⁶ Similarly, the rule that the privilege of choosing the marital home belonged to the husband (subject only to the proviso that his choice be reasonable and genuine)⁷ was abolished by the Law Reform (Husband and Wife) Scotland Act 1984.⁸ So too has been the duty to adhere (i.e., live together).⁹ What is renounced in marrying is much less than in the past, and the relative gain is very much on the side of the wife, who was disadvantaged by most of the rules now abolished. These consequences having been written out of law, and replaced with something closer to legal equality, the husband is obliged to make decisions jointly with his wife: the process tracks her interests as well as his own and public power will not back up his interferences if they are arbitrary. The possibility of horizontal domination recedes. The most important incapacity now entailed by marriage or civil partnership is of course that which prevents an individual entering into a further marriage or a civil partnership.¹⁰ Such incapacity on its own does not seem to constitute a relationship of domination: only in the context of an understanding of the means by which each is ended can a verdict be delivered.

5.3 Ending a marriage

The most obvious way in which the law structures the relationship between husband and wife once married is in the options it gives them for ending the relationship: the law cannot force people to love each other, nor to want to stay married, but it can determine how and why they can divorce: “falling out of love is neither morally nor legally a legitimate ground for divorce,”¹¹ (though there is no reason it should not be). Divorce was no part of the law of Scotland in pre-Reformation times, though a marriage could be nullified for a wide range of

⁶ See Eric M. Clive, *The Law of Husband and Wife in Scotland*, W. Green (1997), at 11.018, and the references there.

⁷ Clive, note 6, at 11.013, and the references there.

⁸ s.4: “Any rule of law entitling the husband, as between husband and wife, to determine where the matrimonial home is to be, shall cease to have effect.”

⁹ Law Reform (Husband and Wife) (Scotland) Act s.2 (1).

¹⁰ Marriage (Scotland) Act 1977 s. 6(4)(b); Civil Partnership Act 2004 s. 86(1)(d)

¹¹ Alison Diduck. *Law’s Families*, LexisNexis (2003), at 45.

reasons.¹² From the time of the Reformation, divorce on the grounds of adultery became available at common law and by an Act of 1573¹³ so too did divorce on grounds of desertion.¹⁴

In 1912 the Gorell Commission report¹⁵ on the grounds for divorce suggested a number of reforms - principally ending the less favourable treatment of women - to the English law of divorce (made available by Matrimonial Causes Act 1857, prior to which divorce was available only via a private act of Parliament).¹⁶ These were eventually implemented by the Matrimonial Causes Act 1937, followed north of the border by the Divorce (Scotland) Act of the following year. This latter renewed the law governing divorce for desertion, reducing the period before divorce from four years down to three and added new grounds for divorce: cruelty, incurable insanity, sodomy and bestiality.¹⁷ Incurable insanity founded, for the first time, the possibility of divorce on a no-fault basis; the development of the law on cruelty, both statutory¹⁸ and via interpretation of the relevant provisions,¹⁹ meant that it too came to permit no-fault divorce in some circumstances. The first steps had been taken away from the approach according to which divorce was based on the fault of one of the parties, constituting punishment for wrongdoing in marriage and so, if no such wrongdoing had taken place, the marriage continued regardless of its status, with intolerable treatment to be tolerated unless it could be shown to fit within certain predetermined categories. From this point of view the most important of the available grounds was that of cruelty, which alone had a potential

¹² The fullest history of divorce in Scotland, told through a series of case studies, is Leah Leneman, *Alienated Affections: Divorce and Separation in Scotland 1684-1830*, Edinburgh University Press (1998). Leneman states the total number of divorce actions in this period to have been just 904 (at 10). See also Charles J. Guthrie, *The History of Divorce in Scotland*, (1910) 8 Scottish Historical Review 39.

¹³ Act of the Parliament of Scotland of 1573, c.55.

¹⁴ The change was made “specifically for the benefit of the Earl of Argyle, Chancellor of Scotland, who was married to but wanted to divorce Jean Stewart, half-sister of Mary, Queen of Scots.” Roderick Phillips, *Putting Asunder: A History of Divorce in Western Society*, (Cambridge University Press (1988), at 61.

¹⁵ Royal Commission on Divorce and Matrimonial Causes, Report (Cd 6478, 1912).

¹⁶ In the absence of formal termination of marriage, the practice of wife sale flourished among the ‘lower orders’: see Katherine O’Donovan, *Sexual Divisions in Law*, Weidenfeld and Nicolson (1985), at 50-53. Divorce via private Act of Parliament occurred at an average rate of 1 a year between 1715 and 1775 and 3 a year between then and the introduction of divorce. Given that the primary motivation was to ensure the supply of legitimate heirs, it is unsurprising that only 4 women were successful in obtaining divorce in this way: Lawrence Stone, *Road to Divorce: England 1530-1987*, Oxford University Press (1990), at 300-2. Scotland, being more liberal, was at this time “the nearest thing to a divorce haven for the English.” Phillips, note 14, at 240.

¹⁷ Divorce (Scotland) Act 1938, s.1.

¹⁸ e.g., Divorce (Scotland) Act 1964, s.5 (2), removing insanity and absence of malice as defences to cruelty.

¹⁹ *Gollins v Gollins* [1964] AC 644, holding that intention to injure is not an essential element of cruelty; *Williams v Williams* [1964] AC 698, holding that insanity is no defence to an action for divorce on grounds of cruelty.

catch-all quality into which generic maltreatment might fall, giving a wife a way out of a marriage that more limited grounds such as adultery were less likely to provide - assuming that she was not so financially dependent that the availability of divorce was rendered irrelevant by crude economic reality.

A Royal Commission on Marriage and Divorce reported in 1950,²⁰ resulting in the Divorce (Insanity and Desertion) Act 1958 and the Divorce (Scotland) Act 1964. The former liberalised insanity as a ground for divorce to reflect changing mental health practice²¹ while the latter widened the definition of cruelty. The report, however, demonstrated major disagreement as to the form that the law on divorce should take, with half its members in favour of introducing marital breakdown as the sole ground of divorce and the other half concerned that to do so would mean that “people would come to look upon marriage less and less as a lifelong union and more and more one to be ended if things began to go wrong,”²² and demanding that, for the sake of the community, the state take a stronger interest in the preservation of marriage.²³ This latter view privileges the existence of a marriage above the well-being of those party to it and the report met with a negative response: the hope was voiced that “this disappointing document may not prove to be the epitaph of divorce law reform.”²⁴

It did not, and in 1966 the Archbishop of Canterbury published a report entitled *Putting Asunder - A Divorce Law for Contemporary Society*. The Law Commission published its own report in that same year.²⁵ The principles it identified for a desirable law of divorce were “the support of marriages which have a chance of survival” on the one hand and, on the other, “the decent burial with the minimum of embarrassment, humiliation and bitterness of those that are indubitably dead.”²⁶ Already, a more realistic and humane approach was evident, and the prospects of reform accordingly improved. The reports agreed that divorce based exclusively upon fault was unsatisfactory, leading to recriminations and the dwelling upon past wrongs,

²⁰ Royal Commission on Marriage and Divorce, Report (Cmd 9568, 1956).

²¹ For the context, see O. M. Stone, *Divorce (Insanity and Desertion) Act 1958*, (1959) MLR 61.

²² Royal Commission, note 20, at [69] (iv).

²³ Royal Commission, note 20, at [69] (vii).

²⁴ Otto Kahn-Freund, *Divorce Law Reform?*, (1956) Modern Law Review 573, at 600, quoted in Otto Kahn-Freund, *Reform of the Grounds of Divorce—The Field of Choice*, (1967) Modern Law Review 180, at 180.

²⁵ Law Commission, *Reform of the Grounds of Divorce - The Field of Choice* (Cm. 3123, 1965).

²⁶ Law Commission, note 20, at [15]. For a consideration of relationship between the two reports, see O. R. McGregor, *Towards Divorce Law Reform*, (1967) 18 British Journal of Sociology 91.

while requiring those who could not get out of failed marriages to form ‘illicit unions’ with new partners, creating difficulties for any children of the union.²⁷ This underlines that the relationship between parties to a marriage which has been dissolved continue to relate to each other - will almost inevitably do so where children are involved - and so the mere fact of the circumstances under which divorce is possible can not provide an exhaustive answer to our question of the law conditions the relationship of the two parties: all else being equal, the law must not just make divorce available, but it must also permit divorce in a fashion which does not poison future interactions between the pair. The process of divorce will often be unpleasant enough: one should not be incentivized to remain in a marriage by the fact that the only way to achieve a divorce will make matters even more unpleasant than they need be.

The Law Commission succeeded where its Royal counterpart had failed previously, Kahn-Freund suggesting that the resulting report was the most competent since Gorell: “for once, we have a lawyers’ document which speaks in terms of cause and effect rather than in terms of guilt and innocence.”²⁸ This document was the basis of the Divorce Reform Act 1969, a statute which split the difference between the Law Commission and a Church of England reports and so “reflected both a traditional obligation-based marriage *and* a modern individualistic one.”²⁹ The law was consolidated by the Matrimonial Causes Act 1973. The Scottish Law Commission had simultaneously been considering the issue³⁰ and its proposals coloured the eventual outcome as contained in the Divorce (Scotland) Act 1976, which was passed only after the failure of seven private members bills introduced with the aim of doing for Scotland what the 1969 Act had for England.

5.3.1 The new law of divorce

The 1976 Act introduced a scheme whereby divorce could be granted only where it had been demonstrated that the marriage had broken down irretrievably, identifying five ways in which such fact could be proven: adultery; behaviour such that “the pursuer cannot reasonably be expected to cohabit with the defender”; desertion leading to 2 years’ non-cohabitation; 2

²⁷ Stephen Cretney, *Family Law in the Twentieth Century: A History*, Oxford University Press (2003), at 56.

²⁸ Otto Kahn-Freund, *Reform of the Grounds of Divorce - The Field of Choice*, (1967) *Modern Law Review* 180.

²⁹ Diduck, note 11, at 50.

³⁰ Scottish Law Commission, *Divorce: The Grounds Considered*, (Cm. 3256, 1967).

years' non-cohabitation with consent; 5 years' non-cohabitation.³¹ The law therefore moved significantly towards no-fault divorce (represented by the condition of irretrievable breakdown) while nevertheless providing a series of relatively objective tests by which the condition of irretrievable breakdown could be recognised, some of which required fault to be proven. The encouragement of reconciliation was written into law, the court being required to continue the action for divorce if there seemed a reasonable prospect of such a thing, with any cohabitation which results not counting for the purposes of the divorce action so as to avoid creating a disincentive for reconciliation.³² The rule demonstrates an attentiveness to incentives that is not a constant feature of the law in this area. Unreasonable behaviour, which has taken the place of 'cruelty' as the most open-ended of the fault-based grounds, is diminished in its significance by the availability of the new no-fault grounds. It is restricted to conduct since the date of marriage and, though the requirement of 'behaviour' must be taken to imply a distinction between behaviour and a state of affairs, or condition, behaviour can be either "active or passive" and will ground a divorce even where it "results from a mental abnormality."³³ The test employed in deciding whether the behaviour is such as to be able to ground a divorce is an interesting mix of the objective and subjective - applying an objective reasonableness test, but one which, through its application to 'the pursuer' takes into account the particular characteristics of that individual, as opposed to the 'reasonable man'.³⁴

The Family Law (Scotland) Act 2006 reduced the period for non-cohabitation and consent to 1 year and that for non-cohabitation without consent to 2 years.³⁵ It also removed desertion as a ground for divorce³⁶ and provided that where an action was brought on the basis of non-cohabitation without consent, the courts would no longer have discretion to refuse divorce in circumstances in which to do so would cause "grave financial harm" for the defender.³⁷ The various grounds for divorce are mostly replicated in the law on civil partnerships as grounds for dissolution of such a partnership: unreasonable behaviour, a year's non-cohabitation and consent; two years' non-cohabitation where there is no consent.³⁸ As with marriage, each of these things is taken as a sign of irretrievable breakdown of the partnership: only on that basis

³¹ Divorce (Scotland) Act 1976, s.1 (1) and (2).

³² Divorce (Scotland) Act 1976, s.2.

³³ Divorce (Scotland) Act 1976, s.1 (2) (b).

³⁴ Clive, note 6, at [20.017].

³⁵ Family Law (Scotland) Act 2006, s.11

³⁶ Family Law (Scotland) Act 2006, s.12.

³⁷ Family Law (Scotland) Act 2006, s.13.

³⁸ Civil Partnership Act 2004, s.44.

does it permit dissolution. Adultery, bearing a specific legal meaning relating to heterosexual parties, is not a ground for dissolution of a civil partnership, though infidelity probably constitutes unreasonable behaviour.³⁹

The law of divorce and dissolution of civil partnerships therefore rest on a strange fiction: on one hand, each is available only where the marriage is taken to have broken down irretrievably - a situation which is held to subsist if one of the four conditions is met, whether or not it is in fact true in the ordinary sense of the term. On the other, if a marriage or civil partnership has broken down beyond repair, this will not suffice to end it unless one of the four conditions can be met: the question, “is thus not a general one, as to whether the marriage has broken down irretrievably in any ordinary sense of those words, but is a particular question as to whether the subsequent provisions of the Act of have been satisfied.”⁴⁰ This reliance upon legal fictions hinders, in theory if not in practice, the availability of divorce: a failed marriage is no such thing in the eyes of the law unless it can be squeezed into one of the statutory boxes. The effect is that the simple agreement of the parties to a marriage or civil partnership that the relationship has failed is insufficient for the grant of a divorce/dissolution, even though it would seem to be indicative of its failure. This is problematic also because those grounds which do require fault to be proven are those which permit the grant of divorce with least delay: prior to the reduction of the time periods, many divorces were obtained on the basis of the fault of one of the parties in part because to proceed on a no-fault basis would have required waiting at least two years.⁴¹

5.3.2 Bargaining, divorce and freedom

In 1988 a Scottish Law Commission discussion paper, *The Ground for Divorce: Should the law be changed?*, asked whether the law introduced by the 1976 Act should be reformed. It noted firstly that the law was misleading (pretending that there was one ground for divorce when in fact there were five (now four)). This is a problem not because, as the paper suggests, it is misleading, but because it conflates fault based and no-fault grounds, demonstrating itself torn between the idea of divorce law as social policy and divorce law as legal

³⁹ On which, see Nicholas Bamforth, ‘*The Benefits of Marriage in All But Name?*’ *Same-Sex Couples and the Civil Partnership Act 2004*, (2007) 19 Child and Family Law Quarterly 133, at 134-5.

⁴⁰ Findlay v Findlay 1991 SLT 457, at 458.

⁴¹ Scottish Law Commission, *Report on Reform of the Ground for Divorce*, No. 116 (1989), at [2.2].

moralism.⁴² Further, the law placed an emphasis on fault liable to lead to “an unnecessary dredging up of incidents which would be best forgotten, an unnecessary emphasis on blame and recrimination and an unnecessary increase in bitterness and hostility,” with one party feeling a sense of injustice at the futility of defending an action where to do so would simply delay the inevitable.⁴³ The separation periods were possibly too long (a fault since remedied) and the law encouraged separation at an early stage so as to be able to procure a divorce as soon as possible.⁴⁴ Most interesting was the claim that the law on divorce introduced in 1976 ‘distorted the bargaining position’ of the parties. This represents a perspective which mirrors the republican concern for law and horizontal domination of the present work and deserves to be quoted at length:

“The spouse who controls the availability of divorce is placed in a strong bargaining position. The most obvious example is where the party who wants the divorce has to found on one of the separation grounds. If the other party consents to the divorce a period of two years' separation is enough. If he or she does not consent, the period is five years. Clearly the giving of consent can be used as a bargaining counter to extract some advantage or concession. It can also happen that a spouse who has committed adultery, or behaved badly, wants a divorce quickly but the other spouse, while recognising that the marriage is dead, is in no hurry for a divorce. In this situation the innocent spouse may be able to extract concessions (for example, abandonment of a claim for financial provision or for access to children) in exchange for agreeing to raise a divorce action.”⁴⁵

In 1980 the Royal Commission on Legal Services in Scotland had expressed a similar thought in slightly stronger terms, arguing that the non-cohabitation grounds should be merged in order to remove “the opportunity for what amounts to ‘blackmail’ in the present arrangements.”⁴⁶ Here, legal rules laid down to implement policy as to the reasons for, and ease with, which divorce should be available have the effect - intended or not - of altering the

⁴² For the ‘misleading’ argument, see Scottish Law Commission, *The Ground for Divorce: Should the law be changed?*, (Discussion Paper no. 76) (1988), at 1-2.

⁴³ SLC, note 42, at 2.

⁴⁴ SLC, note 42, at 4.

⁴⁵ SLC, note 42, at 5.

⁴⁶ Royal Commission on Legal Services in Scotland, *Volume 1: Report*, (Cm 7846, 1980), at 156-157.

relationship between the parties, affecting not just the circumstances under which they can divorce but the manner in which they relate to each other both before they divorce, or even if they never do. The Scottish Law Commission approaches the issue as though it were one of fairness or reasonableness, or as though these consequences might have been unforeseen and so would be unproblematic if adopted consciously. It is suggested instead that we approach the question as one of freedom, employing the republican standard of freedom as non-domination and applying it to a horizontal relationship; to enquire whether the effect of rules determining the availability of divorce might not render the relationship between husband and wife one of horizontal unfreedom in the republican sense.

5.3.3 Horizontal freedom and the conditions of divorce

Neo-republican unfreedom means that in a given relationship one of the parties has the capacity to interfere arbitrarily with the interests of the other. If these distorted bargaining positions identified by the SLC leave one party able to do so, then the implication is not merely that there exists an unfairness, but that the relationship between husband and wife or partner and partner has become one of domination, either because divorce is not available or because its availability is determined by one party, at whose mercy the other now lives. Two options were put forward by the SLC as possible solutions to the faults it had identified. The first was a period of separation alone as the sole grounds for divorce.⁴⁷ Such a reform had been recommended, with a period of 2 years suggested, by the General Assembly of the Church of Scotland in 1969,⁴⁸ and by the Family Law Committee of the Law Society, which preferred a 1 year limit.⁴⁹ The report noted that the period might be as short as three months - long enough to prevent impulsive divorce, but short enough to permit the parties to arrive at a final resolution of their affairs without pointless delay.⁵⁰ The second option, divorce after the lapse of a period of time triggered by the giving of intention to divorce, would have eliminated requirements of separation and consent entirely.⁵¹ Such solution “would not give either party the power to use refusal of consent to divorce as a bargaining counter,” and would be “civilised, simple and economical,” though would “no longer be immediately

⁴⁷ SLC, note 42, at 8-11.

⁴⁸ Report of the Social and Moral Welfare Board to the General Assembly of the Church of Scotland (1969).

⁴⁹ Law Society Family Law Sub-Committee, *A Better Way Out*, (1979) and “*A Better Way Out*” Reviewed (1982).

⁵⁰ SLC, note 42, at 10.

⁵¹ SLC, note 42, at 11-13.

available to the victims of violence.”⁵² A period of 3 months was suggested as ensuring that temporary problems did not lead to over-hasty divorce and that necessary arrangements could be made.⁵³ That period could be extended, but anything over a year would be “unnecessary and excessive.”⁵⁴ The suggested reform was admirable and potentially emancipatory.

Responses to the discussion paper response ranged from those who felt that divorce should be available on demand to those who advocated a return to the pre-1938 rules, with only adultery and desertion available as grounds for divorce.⁵⁵ It concluded that the most important fault of the system as it then existed was the excessive length of the non-cohabitation periods, which encouraged abuse of the behaviour grounds,⁵⁶ and so recommended the dual reforms (the shortening of those periods and the removal of desertion as a ground) that were eventually implemented in 2006.⁵⁷ The SLC’s concern as to the distortion of bargaining power was not shared by respondents, with the view expressed that that “it was perfectly legitimate for a spouse who had not contributed to the marriage breakdown in any significant way and who did not wish a divorce to be able to negotiate his or her consent in exchange for some financial advantage.”⁵⁸ The notion of blame still permeated the discourse, and if one party was put at the mercy of the other, this was unproblematic - as long as the party deserved it.

5.3.4 The expansion of freedom

By the time the 1989 report was written, however, the 1976 Act had already introduced a series of changes which reduced the likelihood of one party possessing the capacity for arbitrary interference which gives rise to a relationship of republican unfreedom: the reform of the law on divorce has served, as much as anything else, to increase (horizontal) freedom by giving a wife legal rights and options which prevent her from being compelled to tolerate, as it were, the intolerable. The worst is already over. This is demonstrated by comparison with the times in which divorce was not available and married women were incapable in law

⁵² SLC, note 42, at 11-12.

⁵³ SLC, note 42, at 12.

⁵⁴ SLC, note 42, at 13.

⁵⁵ Scottish Law Commission, *Report on the reform of the Ground for Divorce* (1989), No. 116, at [1.3].

⁵⁶ SLC, note 55, at [2.8].

⁵⁷ Family Law (Scotland) Act 2006, s.11.

⁵⁸ SLC, note 55, at [2.14].

of owning their own property. Subject to these dual incapacities, the wife lived at the mercy of the husband, with no option but to tolerate the treatment she received and no opportunity to build a life of her own. As Mary Astell suggested, to enter into marriage was to enter into a contract of slavery, to live a life of inescapable dependence on one's husband. Worse, the technical unavailability of divorce in England was coupled with the possibility of achieving it through a private act of Parliament: the 1853 Royal Commission on Divorce concluded that where in Scotland divorce was by then a right, in England it was a privilege of the rich.⁵⁹ Money in theory may have provided an escape route granting a measure of freedom, for rich wives, but in practice was used mostly to allow husbands to jettison inconvenient wives where, in failing to deliver a son, they put at risk the family line or the integrity of its estate.⁶⁰ Poor wives were doubly enslaved in their relationship to their social superiors and to their husbands, to whom they were forever bound by law, unable to escape even had they the property to build a new life.

5.4 The background of property

As both the inability to secure a divorce and the loss of one's property rights on marriage contributed to this condition of unfreedom, the reform of neither one nor the other alone would suffice to turn what was often a relationship of domination into one of freedom, with neither party living subject to the arbitrary interference of the other. Divorce without a suitable system for the making of financial provision is liable to force the dominated partner to tolerate what he or she should not, and otherwise could not, tolerate: indeed, where the former is available but the latter not, it is probable that the upper hand is given to the party with greater resources, who can rid himself of the financial obligations which come with marriage without any sort of sacrifice as a corollary - the capacity for arbitrary interference by husband with wife derives not from her inability to leave him but from her need to act in a certain manner, lest he leave her.⁶¹

⁵⁹ Royal Commission on the Law of Divorce, *First Report*, (1853). For detail, see Oliver Ross McGregor, *Divorce in England - A Centenary Study*, Heinemann (1957), at 17.

⁶⁰ For a description of the opposite argument, that "the prevailing system rewarded, rather than punished, the adulterous wife," see Philips, note 14, at 413.

⁶¹ For an economics perspective concluding that "in general both dissolution rights and property rights are important in affecting whether people divorce, with the consequent policy implication that divorce reform and property law reform must be considered together," see Simon Clark, *Law, Property, and Marital Dissolution*, (1999) 109 *The Economic Journal* 41, at C53.

So, though the rules on the when and why of divorce are central to the freedom of wife in relation to husband, they are simply the visible surface of a much deeper question, one which cannot be understood without a fuller appreciation of the financial aspects of the relationship between husband and wife - as it exists during marriage, and how the law will alter it if the marriage is dissolved. What in the past was inevitable - economic reality undermining the theoretical possibility of divorce, leading those who live at the mercy of their husbands to continue to do so even though, in law, a divorce might be possible - persists as a sometime phenomenon. Similarly, relevant, then, to our understanding of the impact of law upon the horizontal freedom of spouses and civil partners are those rules which govern the respective property rights of the parties and, crucially, the division of property on divorce. Indeed, the move away from fault based divorce in the 1970s saw the primary function of the court change: “adjusting the financial situation of divorcing parties rather than adjudicating upon moral notions of fault, blame or desert became the court’s preoccupation.”⁶²

5.4.1 Marital property at common law

At common law, the effect of marriage in Scots law was to create what was described as a ‘communion’ of goods: effectively, the transfer of all moveable property belonging to the wife (regardless of when acquired) to the husband according to the right of *jus mariti*, along with any pre-marital debt, for as long as the marriage continued to exist.⁶³ Said property was the husband’s to deal with as he pleased and though he did not acquire ownership of the wife’s heritable estate, he enjoyed the legal right to administer it (the *jus administrationis*), and the ownership of rent or produce arising from it.⁶⁴ Excluded was only the wife’s *paraphernalia*, including her dresses, jewelry and their containers.⁶⁵ The husband, however, could renounce his *jus mariti* by way of ante-nuptial contract.⁶⁶ Where the marriage was dissolved by death within a year and a day, the wife regained her property in full unless a child had been born (and heard to cry); otherwise, she was entitled to a third of moveable property if there were children to the marriage, a half if not.⁶⁷ On divorce, the wife was

⁶² Diduck, note 11, at 51, describing the view expressed by Carol Smart in *The Ties That Bind: Law, Marriage and Reproduction of Patriarchal Relations*, Routledge (1984).

⁶³ Clive, note 6, at [14.002].

⁶⁴ Clive, note 6, at [14.002].

⁶⁵ E.g., *Dicks v Massie* (1695) Mor. 5821.

⁶⁶ *McDougall v City of Glasgow Bank* (1879) 6 R. 1089.

⁶⁷ Clive, note 6, at [14.004].

entitled to nothing if the ‘guilty’ party or to the same as on her husband’s death if ‘innocent’.⁶⁸ The regime for division of property on divorce was therefore an artifact of the same moral considerations that limited the availability of divorce itself while, short of divorce, the law on property set the conditions for a relationship of significant unfreedom.

5.4.2 Statutory departure

The entitlement of the husband to the wife’s property persisted even if the couple was separated or the wife had been deserted: all property which she acquired or inherited continued to pass automatically into the ownership of her husband.⁶⁹ The rule was abolished in 1861, by an Act which provided both that property acquired by the wife other than by her own industry was not to be subject to the *jus mariti* unless the husband made reasonable provision out of it for the wife’s maintenance,⁷⁰ and that after the grant of a judicial separation, property which a wife acquired would belong to her and not pass to her husband and permitted her to seek an order implementing the same rule in cases of desertion.⁷¹ A statute of 1877 gave women the right to income which they earned themselves, which the husband came neither to own nor to administer.⁷² Simultaneously, the husband’s liability for the ante-nuptial debts of his wife was reduced to the value of the property he acquired in consequence of his marriage to her.⁷³ The legal sublimation of the wife into the identity of her husband was progressively undone; the first steps taken towards a situation in which she lived with him, if not yet as an equal, then at least as a separate entity, with interests of her own which he could later be required by law to take into account.

The Married Women’s Property (Scotland) Act 1881 abolished the right of a husband to the moveable property of the wife, though left intact the husband’s right to administer that property, meaning that though a wife now continued to own her own property following marriage, she still required the consent of her husband if she wished to dispose of it.⁷⁴ No longer were the rent of and produce of the wife’s heritable property to become the property of

⁶⁸ Clive, note 6, at [14.004].

⁶⁹ One of the “most obvious injustices of the old law”: Scottish Law Commission, *Family Law: Report on Marital Property*, No. 86 (1984), at [1.4].

⁷⁰ Conjugal Rights (Scotland) Amendment Act 1861, s.16.

⁷¹ Conjugal Rights (Scotland) Amendment Act 1861, s.1 and s.6.

⁷² Married Women’s Property (Scotland) Act 1877, s.1.

⁷³ Married Women’s Property (Scotland) Act 1877, s.4.

⁷⁴ Married Women’s Property (Scotland) Act 1881, s.1.

the husband, for his right of administration over them was abolished.⁷⁵ The *jus administrationis* itself was abolished by a 1920 statute⁷⁶ which also granted married woman the legal capacity to dispose of their property at their own will, and to enter into contracts, incur obligations etc. as though unmarried.⁷⁷ The current law is contained in the Family Law (Scotland) Act 1985 (as amended to extend the principle to civil partnerships by the Civil Partnerships Act 2004) which provides that neither legal institution shall affect “the respective rights of the parties... to their property.”⁷⁸ A wife retains full capacity to contract notwithstanding her married status, and her vulnerability to the arbitrary interference with her property by her husband has been removed by virtue of this incremental legal change. The vulnerability was a function of contingent legal rules and so subject to unraveling by legal reform.

5.4.3 The undue influence exception

If, however, a wife enters into an obligation to a third party acting under the undue influence of her husband or on the basis of a misrepresentation made to her by her husband, then that third party may find the obligation unenforceable if it cannot be shown to have acted in good faith towards the wife. In *Smith v Bank of Scotland*⁷⁹ a woman brought an action for the reduction of a security which she and her husband had jointly granted over their matrimonial home for a loan required for her husband’s business, in which the bank knew her to have no involvement. She had no opportunity to review the document, nor was she advised to take independent legal advice, and claimed to have signed the paperwork only on the basis of various misrepresentations made to her by her husband, principally that her own personal assets were not put at risk by the taking of the loan. The House of Lords, accepting that there was no reason to refuse to extend the logic of an English case, *Barclays Bank Plc. v*

⁷⁵ Married Women’s Property (Scotland) Act 1881, s.2.

⁷⁶ Married Women’s Property (Scotland) Act 1920, s.1.

⁷⁷ Married Women’s Property (Scotland) Act 1920, s. 3.

⁷⁸ Family Law (Scotland) Act 1985, s.24. In England, Kahn-Freund argued that maintaining separate property to promote equality between genders may have had the opposite effect, for “to treat as equal that which is unequal may... be a very odious form of discrimination.” Otto Kahn-Freund, *Marital Property and Equality Before the Law: Some Skeptical Reflections*, (1971) 4 Human Rights Journal 49, at 51, quoted in O’Donovan, note 16, at 113.

⁷⁹ 1997 SC (HL) 111. The decision in *Smith* (which overturned the decision of the Inner House, upholding the Outer House), was subject to considerable criticism - see, e.g., George L. Gretton, *Sexually Transmitted Debt*, (1997) Scots Law Times 195 and *Sexually Transmitted Debt*, (1999) Journal of South African Law 419, at 428-30.

O'Brien,⁸⁰ to Scotland, held that “in circumstances where the creditor should reasonably suspect that there may be factors bearing on the participation of the cautioner which might undermine the validity of the contract through his or her intimate relationship with the debtor the duty [“to give the potential cautioner certain advice”] would arise and would have to be fulfilled if the creditor is not to be prevented from later enforcing the contract.”⁸¹ To impose this additional burden shows how far the pendulum has swung: where once the law placed certain incapacities on a woman become wife, increasing her vulnerability to the arbitrary interference of her husband, here it adapts so as to protect her, in law, from a vulnerability whose source is extra-legal. The solution to the problem of horizontal domination of wife by husband is not to treat the two as strangers in all things. To do so is to ignore the reality of the source and location of power: here it is extra-legal and it is right for law to counter as it is for laws which give rise to domination to be reformed.

5.6 Financial provision on divorce

Most relevant, then, to the freedom of parties to a marriage are the rules as to financial provision if it ends. The 1976 Act entitled either party to apply to the court for an order requiring payment of either a periodical allowance or of a capital sum,⁸² providing that the court will make “such order, if any, as it thinks fit, having regard to the respective means of the parties to the marriage and to all the circumstances of the case”⁸³ Financial provision was therefore left largely at the discretion of the judge. This allowed for general continuity with the rules introduced by the Succession (Scotland) Act 1964, which had marked a significant departure from the prior law, whereby the ‘guilty’ party was not entitled to any financial provision, being regarded in law as having died at the date the decree of divorce was granted. It had the potential in other cases, however, to be less generous than the system it replaced, which entitled an ‘innocent’ wife was entitled, on divorce, to either a third or a half of her husband’s property. The stark discretion inherent in the scheme under the 1976 could therefore be either better or worse for parties than had been the status quo ante. No verdict could be pronounced in the abstract, however: a Scottish Law Commission report of 1981 drew attention to the fact that neither in the 1976 Act nor anywhere in the case law was the

⁸⁰ [1993] UKHL 6, [1993] 4 All ER 417.

⁸¹ 1997 SC (HL) 111, at 121, per Lord Clyde.

⁸² Divorce (Scotland) Act 1976, s.5 (1).

⁸³ Divorce (Scotland) Act 1976, s.5 (2).

general objective of making financial provision spelled out.⁸⁴ The resulting flexibility was balanced against the fact that judges differed significantly in their approach to the issue, and the result was an state of affairs whereby “questions of social policy, which have very important financial consequences for individuals [...] turn on informal understandings and somewhat arbitrary rules of thumb based on no ascertainable principle and known only to a small circle of court practitioners.”⁸⁵ It was impossible to provide reliable legal advice, and solicitors were given incentive to enter into a fraught process of negotiation which might be upset once the identity of the presiding judge became known: “Such a system”, it concluded, “does nothing to help the parties to arrange their affairs in a mature and amicable way. It is calculated to increase animosity and bitterness.”⁸⁶

5.6.1 Perverse incentives

Not only. It also provided a strong incentive to a dominated partner to stay in a relationship far beyond the point at which he or she would have preferred to leave: why seek a divorce when the question of whether or not one will be able to afford to live independently is decided predominantly by the process by which a case is allocated to a judge?⁸⁷ Having considered a variety of objectives which might be laid down to govern the process of making financial provision (punishment, continuing support, relief of the public purse, the relief of need etc) the report concluded that no single objective was suited to underpinning a system of this sort.⁸⁸ Instead, it recommended a system whereby financial provisions should be made if and only if justified by the fair sharing of matrimonial property or the burden of child-care; fair recognition of contributions and disadvantages; fair provision for adjustment to independence; or relief from grave financial hardship.⁸⁹

That children have an independent right of aliment or maintenance which precedes consideration of financial provision as between the parties to a divorce or dissolution of a civil partnership simplifies the question, as it means that the making of financial provision has as its principal subjects the parties themselves. Where an order for aliment can not

⁸⁴ Scottish Law Commission, *Report on Aliment and Financial Provision*, No. 67, (1981), at [3.35].

⁸⁵ SLC, note 88, at [3.37].

⁸⁶ SLC, note 88, at [3.37].

⁸⁷ The legal realist aspects of this point will be appreciated.

⁸⁸ SLC, note 88, at [3.59].

⁸⁹ SLC, note 88, at [3.64]-[3.68].

include a lump sum but must be a periodic payment, an order for financial provision on divorce reflects the 'clean break' ideal, and an order for payment of a periodic sum can be made only if the court is satisfied that an order requiring the transfer of an asset or the payment of a capital sum is "inappropriate or insufficient" in the circumstances.⁹⁰ If one is made, a periodic order will lapse with either the death or the remarriage of the party in receipt of it.⁹¹ An order, whether for payment of a lump sum or a periodic order, can be made only where justified by the objectives outlined in the statute, and where it is reasonable with regard to the resources of the parties. The court therefore must make a decision in accordance with the new principles, but is left, via the reasonableness test, a level of discretion in doing so. These provisions are extended to the system of civil partnerships by schedule 28 of the Civil Partnership Act 2004.

5.6.2 The principles governing financial provision

The principles recommended by the Scottish Law Commission for the underpinning of the system of financial provision were not implemented directly - in the Family Law (Scotland) 1985 Act, those which apply are that the net value of matrimonial property should be fairly shared between the parties; that fair account should be taken of an economic advantage or disadvantage which falls to one party from the contributions of, or in the interest of, the other; that the economic burden of caring, after divorce, for a child of the marriage under the age of 16 should be fairly shared between the parties; and that a where one party has been substantially financially dependent on the other then financial provision should be made to permit the dependent party to adjust.⁹²

It will be obvious how the uncertainty which preceded the 1985 Act undermined the system of bargaining relations which was inadvertently implemented by the 1976 Act. One of the major considerations when thought is given to ending a marriage, must be the financial situation in which one will be left. If no financial provision is going to be made at the point of the grant of divorce, or if there is a radical uncertainty with regards to the outcome which will follow from the essentially discretionary legal rules which apply, then the grounds upon which the divorce can be granted are of less relevance: there is a considerable incentive for

⁹⁰ Family Law (Scotland) Act 1985, s.13 (2) (b).

⁹¹ Family Law (Scotland) Act 1985, s.13 (7) (b).

⁹² Family Law (Scotland) Act 1985, s.9.

those who would otherwise leave a marriage to remain within it and attempt to tolerate the situation in which he or she finds himself. From this point of view, the current system would seem to meet a minimum requirement of republican freedom: the financial provisions made will not normally be so poor that one party is compelled to live at the mercy of the other rather than face intolerable circumstances. This is not, of course, the same as saying that a wife will leave a marriage into a situation she would objectively desire to be in: it is simply that an intolerable financial situation outside of a marriage is no more (but certainly no less) intolerable than such a situation inside a marriage. A wife need not be as well off after divorce as before it - in the prevailing system of economic organization, such an outcome is a hope too far. What she must not be is so badly off after it, that she has no choice but to remain within it; the law must not condemn her to horizontal unfreedom.

5.7 The matrimonial home

A more specific issue relevant to republican freedom is occupation of the matrimonial home, legal rules regarding which will be central to the question of whether it is practical for one party to leave the other. If title to the matrimonial home is taken in the name of one party alone, then that person is the owner of the property, and the fact of marriage does not alter that directly. If taken in joint names, the home is common property, and each of the multiple owners owns a half share of the value of the property, which he or she is entitled to dispose of at any point, without either the knowledge of the partner or that party's consent. At common law, ownership comes with a right to the exclusive possession of one's property which, from the husband's point of view, was not overridden by the fact of marriage or the mutual duty of aliment between partners. From the wife's point of view, however, until the statutory reforms outlined above, the husband's common law right of administration over her heritable property entitled him to exclude her from a home she herself owned. Where she did not, the process was even easier: in *MacLure v MacLure* the Court of Session held that a husband (who intended to continue to fulfill his duty of aliment) was entitled to an order requiring his wife to leave the hotel of which he was the tenant (and in which they lived as a couple), at threat of forceful ejection by officers of the Court.⁹³ This depended, the Lord President held, "not upon his right as a husband, but upon his ordinary right of property in the house."⁹⁴

⁹³ *MacLure v MacLure* 1911 SC 200.

⁹⁴ *MacLure v MacLure* 1911 SC 200, at 205.

In 1978, a Scottish Law Commission discussion paper argued that the common law rules, out of step with most European and commonwealth systems, were unjust to one party (in most cases the wife), unrealistic in that they treated husband and wife as though strangers to each other, and out of date.⁹⁵ The need to remedy this general unfairness was compounded by a desire to promote a more specific social objective: protecting women from domestic violence. The common law rules meant that women were compelled to endure violence because “they have nowhere else to go” and “cannot protect themselves by ejecting their husbands because the title to the home is normally in his name or in joint names.”⁹⁶ It recommended that “where one spouse only is entitled or permitted to occupy a matrimonial home exclusively the other spouse should by virtue of marriage have a statutory right of occupancy.”⁹⁷ The common law rules were, in accordance with these recommendations, usurped by the Matrimonial Homes (Family Protection) (Scotland) Act 1981. That statute creates the categories of ‘entitled’ and ‘non-entitled’ party to a marriage or civil partnership (the former the owner or tenant of the matrimonial home; the latter not) and grants to the non-entitled party a right to continue occupation of that home or, if not in occupation, to enter into and occupy it.⁹⁸ While these rights subsist, they are not defeated by the disposal of the property, and so a third-party purchaser of a home in relation to which a non-entitled partner has a right of occupation takes the home subject to that right.⁹⁹ In such circumstances, the purchaser is not entitled to occupy the property unless the non-entitled spouse has consented to the dealing.¹⁰⁰ The non-entitled spouse’s occupancy right can be defeated if the transaction between entitled spouse and this third party is for value and in good faith, the latter being demonstrated by a written declaration that no occupancy rights under the Act in relation to the property were possessed at the time of the dealing.¹⁰¹

Not only though, does the 1981 Act grant a right of continuing occupation to a non-owner spouse. It also takes the bigger step of permitting the exclusion of either partner from the matrimonial home. The court, under s.4(2) of the Act:

⁹⁵ Scottish Law Commission, *Discussion Paper: Occupancy Rights in the Matrimonial Home and Domestic Violence, Volume 1: Survey of Proposals*, (1978), at [0.5].

⁹⁶ SLC, note 99, at [0.6].

⁹⁷ SLC, note 99, at Part VII, [2.1] (78).

⁹⁸ Matrimonial Homes (Family Protection) (Scotland) Act 1981, s.1 (1).

⁹⁹ Matrimonial Homes (Family Protection) (Scotland) Act 1981, s.6 (1).

¹⁰⁰ Matrimonial Homes (Family Protection) (Scotland) Act 1981, s.6 (3) (a).

¹⁰¹ Matrimonial Homes (Family Protection) (Scotland) Act 1981, s.6 (3) (e).

“shall make an exclusion order if it appears to the court that the making of the order for the protection of the applicant or any child of the family from any conduct or threatened or reasonably apprehended conduct of the non-applicant spouse which is or would be injurious to the physical or mental health of the applicant or child,”

unless, having regard to all the circumstances of the case it would be unjustified or unreasonable to do so.¹⁰²

5.7.1 The quality of interference

The major benefit of this statutory departure from the standard rules of property will again accrue to the wife, historically the vulnerable partner in a marriage, and help ensure that she does not live at the mercy of her partner. Let us appreciate two points about this new scheme. The first is that the departure from the common law position does not constitute an equivalent departure from some sort of pre-legal, natural, order: the bundle of rights associated with ownership is always and everywhere contingent, existing not as an inalienable corollary of ownership, but only insofar as recognised by law. There is no a priori reason that ownership should imply the possibility of excluding other parties - that it has normally done so is probably a function of the identity of those who traditionally determined the rules of property - and, concomitantly, no reason why the law should not, as here, provide other parties with a right incompatible with the ‘normal’ rights of ownership.

Secondly, in no sense is the reach of public power extended by the modifications made to each spouse’s bundle of rights. Instead, the coercive apparatus of the state, whose democratic legitimacy distinguishes it from all other sources (but not instances) of coercion in society, is put at the service of one party where in the past it had been put at the service of the other: the modification is qualitative. If unfreedom is constituted by interference on the part of public power, there is no more unfreedom here than in a scheme of property that would be endorsed by classical liberalism. And if, as I suggest, we are obliged by both theory and practice to take seriously horizontal unfreedom - the unfreedom of the wife as to her husband, and vice versa - then at no cost of vertical (liberal) freedom we achieve a notable diminution in the

¹⁰² Matrimonial Homes (Family Protection) (Scotland) Act 1981, s.4 (1) - (3).

prevalence of domination in society: the possibility of a party having to tolerate domestic violence or any other form of unacceptable treatment for reason of having nowhere else to go is greatly reduced. The state - which recognises property rights; without which property rights as we know them would not exist - can promote the freedom of its citizens by altering the specific consequences which flow from ownership.

5.8 Effects of legal reform

As elsewhere in this work, our focus in this chapter has been that of the domination for which law is responsible, according to the logic that such domination is the type of which is best suited to being undone by law. Where law is the cause, so too can law be the solution. The promotion of human freedom (in the horizontal sense) through law is not, however, as limited a goal as it might at first seem. Important empirical work upon the conditions under which divorce is available suggests that the wider social ramifications are of an importance which far outranks the abstract ‘freedom’ which might be achieved. One central piece of research argues that contemporary divorce law acts as “a framework within which divorcing couples can themselves determine their postdissolution rights and responsibilities,”¹⁰³ and so when they negotiate a settlement in relation to money or the custody of children they do not do so “in a vacuum.” Instead, “they bargain in the shadow of the law.”¹⁰⁴ The framework we have described, the rules laying down the conditions under which public power, whose exercise is determined by law,

“give each parent certain claims based on what each would get if the case went to trial. In other words, the outcome that the law will impose if no agreement is reached gives each parent certain bargaining chips - an endowment of sort”¹⁰⁵

Traditional law and economics perspectives view this process through the prism of the distribution of wealth and considerations of economic efficiency; the account offered above suggests that what is really at issue is the distribution of freedom. What matters, however, is

¹⁰³ Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of Law: the Case of Divorce*, (1979) 88 The Yale Law Journal 950, at 950.

¹⁰⁴ Mnookin and Kornhauser, note 103, at 968.

¹⁰⁵ Mnookin and Kornhauser, note 103, at 968.

that changing rules so as to facilitate freedom brings with it concrete, measurable gains. In the context of American divorce law, the fact that the introduction of unilateral divorce took place on a state by state basis permits comparison both between jurisdictions which had and had not introduced it and in the same jurisdiction over time; before and after the introduction of unilateral divorce.¹⁰⁶ The results were striking:

“Changes in divorce law led to one spouse being able to obtain a divorce without his or her partner’s consent. Examining state panel data on suicide, domestic violence, and murder, we find a striking decline in female suicide and domestic violence rates arising from the advent of unilateral divorce. Total female suicide declined by around 20 percent in the long run in states that adopted unilateral divorce”¹⁰⁷

When we use the law as a tool to grant freedom, we reduce the frequency with which individuals, find themselves living at the mercy of others, will suffer the consequences of having no other option - no way to get out and nowhere else to go. When we argue for a freedom we do it in the knowledge that this means to militate for psychological security and against desperation, and that this is something far bigger, far more important, than the issue of who gets what or whether any given rule is as efficient as it might be. Domination and non-domination translate into real, measurable, outcomes.

5.9 Conclusion

On consideration of the trajectory of the rules of law relating to marital property, the availability of divorce and financial provision on divorce can, it is suggested, be understood as having the effect of the increasing the freedom of the wife, the party previously most disadvantaged by legal inequality. It did so by altering the legal background against which and legal framework within which she relates to her husband, moving away from a system

¹⁰⁶ The use of fault-based and no-fault procedures will itself be influenced by background factors: a 1998 paper explained the remarkable divergence between England/Wales and Scotland regarding grounds for divorce in terms of the “cost incentives generated by legal and procedural interventions within the respective legal systems,” principally the introduction of a Simplified Procedure for no-fault divorce in Scotland in 1983; Ian Smith, *The Economics of the Grounds for Divorce in Great Britain*, (1998) 6 *European Journal of Law & Economics* 39, at 49.

¹⁰⁷ Betsy Stevenson and Justin Wolfers, *Bargaining in the Shadow of the Law: Divorce Laws and Family Distress*, (2006) 121 *Quarterly Journal of Economics* 267, at 286.

where, within certain loose and generous limits, he had a vast capacity to interfere with her interests at his own pleasure, to one in which he can no longer be confident in his ability to do so without violating the law. The law now permits her to extricate herself from the legal relationship into which she has entered knowing that she is unlikely to be intolerably less well off if she does so. This is not, however, about the extent of state involvement in the relationship - marriage is a legal institution and there is only so far the state could retreat before what was left was not marriage at all: where it was reduced to a religious institution without legal consequence. The variation in the involvement of public power is not quantitative: it is qualitative. Where many advocates of freedom would have us believe that human freedom is promoted by the retreat of the state down to a minimal role, the example of divorce suggests otherwise. By taking seriously the twin claims that one can be unfree horizontally (as, here, between husband and wife or one partner and the other in a civil partnership) and that interference by one party with the interests of another is neither unambiguously good or unambiguously bad, but to be deprecated only where the perpetrator has the capacity to interfere on an arbitrary basis, we see that the careful recalibration of the circumstances under which public power will be made available to one party to 'use' against another can increase the freedom of individuals without altering the net level of state involvement. Rules on marriage and divorce are a prime example of the current thesis specifically because the domination was, to a considerable extent, a function of contingent legal rules.

We saw too, though, that the direct legal regulation of the relationship between husband and wife could not add up to an exhaustive account of the role of law in constituting domination. Vital too is the background distribution of property. Were Pettit correct in his assertion that the law of property is akin to the natural environment, it would constitute a hard limit upon the ability of law to undo relationships of domination - at least without, to embrace the metaphor, calling in the bulldozers: we would be seeking to use law to fulfil a function for which it was fundamentally unsuited. As we have seen, and will see again, this is not the case: the law is central not just to the existence of private property but also the conditions attached to it: who owns what, and what that means. Property, the general, inescapable background which conditions *all* relationships is no less suited to legal intervention in pursuit of non-domination than is a specific legal relationship such as that between husband and wife and, moreover, intervention in that context can promote freedom far more broadly than can

alterations to a relationship which subsists between two (and only two) individuals. Changing rules as to the availability of divorce can free a wife from the domination of her husband, or vice versa, but it cannot undo any relationship of domination in which they might stand to broader society. An exploration of the rules of property, as well as reflection upon its distribution, suggest a method of promoting non-domination more generally.

The progress demonstrated by the law in this area derives not from the inevitable progress of human society on which it is parasitic, nor from the unfolding of some historical process leading to a predetermined end. It is the contingent result a constantly evolving set of societal attitudes and reflects the overlap of a variety of incompletely theorized positions reflected through the prism of the (sometimes) democratic process and the timely updating of the common law. This democratic process is of considerable importance, to which we shall return: we have shown how horizontal non-domination has been promoted, but it remains to contextualise that process in relation to the question of vertical (non-) domination. We cannot predict that the legal position of wife, husband, civil partners etc as it will exist in future, nor be complacent that the undeniable improvements of the past have set any sort of template for future development. Having reconceptualised some of the key developments as normatively desirable according to a particular understanding of freedom, we are in a position to suggest what might need to be done in order to further promote the republican freedom whose increase has been the result of the reforms hitherto. The same law which once rendered unfree by putting the coercive apparatus of the state at the disposal of husbands regardless of the nature of the interference they perpetrated with the interests of their wives or by neglecting to bring its coercive apparatus to bear where certain interference with one's interest took place in a domain designated as 'private,' has spread freedom by refusing to back up, and at times resisting, certain interferences: by considering areas in which a capacity for arbitrary interference exists and seeking to subvert this capacity, the law can continue on an emancipatory trajectory. Where, however, it rolls back the programme of wealth redistribution via taxation and welfare payments (often in pursuit of the 'freedom' of those who would have to pay the tax), it undercuts that programme: it threatens a situation in which, regardless of the foreground rules by which husband and wife interact, the background distribution is such as to mean one lives at the mercy of the other. The specific rules of law which, in Astell's time, condemned wives to live at their husband's mercy having been largely undone, the horizontal relationship is less likely to be one of domination. There

remains, however, much that could and should be done. That, instead, we are required to defend the status quo against reversal, says much about the relative strength of liberal and republican discourses of freedom.

Part 2 - Chapter 6: Law, Freedom and Property; The Case of Employees

6.1 From the specific to the general

The previous chapter considered a special case of potential horizontal unfreedom in modern society, explaining the manner in which, due to their relationship being constituted by law, the law was capable of altering the conditions under which public power would be made available to one party against the other (both directly and in relation to material things) so as to turn what had historically been a relationship of domination into one of freedom, both where that domination had been a function of law and, sometimes, where it had not. Astell's observations on the application of the republican ideal of freedom to the relationship between husband and wife, insofar as their truth was a function of law, could be addressed by law; public power's role in endorsing arbitrary interferences - either actively or passively - or in prohibiting resistance thereto, has been and could be further undone.

The law on divorce and dissolution is, however, *sui generis* by reason of relating to a pair of highly particularistic legal relationships. Marriages and civil partnerships must be formed by two (and only two) parties who meet a variety of criteria more demanding than those for legal relationships such as that of contract. The two relationships are similarly particular in their relationship to the background distribution of wealth and entitlements: though formed against it and mostly respectful of it, such that the legal rights (property and otherwise) of the parties to such a relationship are (now) largely left intact by the formation of the marriage/civil partnership, the ending of each relationship is capable of radically altering that background distribution, such that the intervention by public power, at least in relation to material things, might take place on a very different basis after dissolution. One effect of this radical discontinuity is to promote freedom: in the first place that of the party in the inferior position in relation to the other but more generally in relation to all those other actors that the former party might encounter. A woman who has missed out on educational and employment opportunities should not leave a marriage and find herself jumping from the frying pan of spousal domination into the fire of wider social domination, though if neither party had any assets to begin with, then there is of course nothing to redistribute and the result is likely to be a dual unfreedom which mere tweaking of one's legal rights cannot undo. The potentially radical alteration of the conditions of interference by public power is readily justified, and not

only from the perspective of republican freedom: it is now a prominent feature of schemes of family law.

The scope for a radical discontinuity of property rights is therefore freedom-increasing in a manner commensurate with the social importance attributed to the relationship to which it applies. We have used it as an example of how the freedom of a given individual might be increased without the overall extent of the interference by public power being altered, either up or down. We can use it for a second purpose: that of highlighting the potential for unfreedom in any legal relationship in which there does not apply any such discontinuity - where parties contract against a background distribution of wealth and entitlements which is stable, altered only to the extent provided for by their transaction or by laws of general application. It is for exactly the purpose of such alteration that the 'typical' contract is entered into. In generalizing outwards from the very specific legal relationships of marriage and civil partnerships, we take as our next example of legal analysis such a relationship: that which exists between employer and employee, in which the relevant alteration to the distribution of property derives from the paying to the employee of a wage, in return for services rendered to the employer. This was the second of the two sorts of horizontal domination identified as challenging the state-oriented orthodoxy of both liberalism and neo-republicanism: that which the labor republicans identified as (potential) 'wage slavery'.

6.2 The employer/employee relationship

Compared to a marriage a relationship of employment can be entered into under a far broader range of circumstances: more or less any person can be an employer, and any an employee; relationships of employment can overlap, being formed and dissolved with far less ceremony and far more easily than is a marriage or a civil partnership. Easier to enter and easier to leave. In the form in which the two challenges of horizontal domination - marital domination and 'wage slavery' - were originally presented, they differ in a further fashion, which demonstrates why the latter has far greater contemporary resonance than does the former. In Astell's day (and long beyond it) the primary (though never sole) contribution to the situation of relative inequality of the two parties and the relationship of domination consequent upon it was the differential treatment of husband and wife in law: legal discrimination was at the heart of one party's ability to arbitrarily interfere with the interests of the other. Only as this

different treatment receded, and husband and wife began to be treated in law as (almost) equals, did the underlying problem of unequal distribution of wealth emerge as the primary target of legal adjustment. The problem of wage slavery as formulated by labor republican thinkers, on the other hand, was never a problem of legal discrimination - unlike the self-evidently inegalitarian and obnoxious chattel slavery to which it was variously compared and contrasted. Instead, wage slavery was primarily a problem of formal equality in the context of material inequality - the paradigmatic case being a worker without access to productive capital - and, we have seen, it was the triumph of a specific conception of formal inequality that marked the end of the labor republican challenge to the problem of wage slavery: an understanding of freedom had been constitutionalized in which the problem of wage slavery disappeared through regularization. Absent the republican conception of freedom, the problem could no longer be made coherent. The gap left by this defeat is one that thought based upon liberal freedom has never adequately filled - being, I have contended, fundamentally unsuited to the task. Where domination had derived from legal discrimination, the removal of that discrimination made a significant contribution to the process of undoing domination: where it did not, and does not, the domination was not so easily unravelled.

6.2.1 Property, material needs and employment

We have suggested that part of what makes law the primary contributor to the existence of domination - far more than, for example, social factors - is the fact that 'everything' (by which one means primarily the means by which one might materially support oneself) is already owned. The rules laying down the conditions under which and the identity of the parties on behalf of whom public power will intervene with regards to material goods, moveable and immovable, is therefore the single most important factor in determining the ability of an employer to coerce a potential employee to accept the terms offered. Though economic considerations might be relevant to the decision to marry, the contract of marriage is not usually a mechanism through which one meets one's material needs, while those same material needs - the various biological imperatives and the need for shelter etc. - are the *primary* reason for which one enters into a relationship of employment: everything being owned, one's attempts to fulfil those needs without property of one's own will invariably involve a confrontation with the state's coercive apparatus in its role of guardian of ownership according to the logic of differential interference explained in chapter 4, while to

(lawfully) acquire the property that one can then exchange for the material goods necessary to meet one's biological needs will usually involve the sale of one's labour. The role of public power in securing property, as well as the conditions under which it does so, is therefore part of the inescapable background of the decision to enter into a relationship of employment *at all*. That its direct regulation then further conditions the relationship between employer and employee - determining whether or not it is one of freedom - is hardly surprising.

6.3 A theory of (republican) freedom and law

The idea that law manages the relationship between employer and employee resembles in certain key respects that of Otto Kahn-Freund in his 1972 Hamlyn lectures, where he defines law in functional terms, as aimed at “the regulation of social power.”¹ Power, understood as “the capacity effectively to direct the behaviour of others” is unevenly distributed, the result of a confluence of a variety of interacting and overlapping factors, among which the law is only one: power “is sometimes supported and sometimes restrained, and sometimes even created by the law, but the law is not the principle source of social power.”² It is at this social power, regardless of its origin, that law (for Kahn-Freund's purposes, labour law) takes aim, without concern for the identity of the party which exercises the power. Specifically, the principal purpose of labour law is “to regulate, to support, and to restrain the power of management and the power of organised labour.”³

Kahn-Freund is correct in his insistence that not all power derives from law: this was particularly true in a class-dominated society which had not yet felt the force of the neo-liberal reforms of the 1980s and which hung tightly to the symbolic and cultural capital which acted as keys to unlock entry into the higher orders. And though those same class categories linger on in Britain today it is no longer reasonable to suggest, as Kahn-Freund does, that law is not the principal source of social power: in a world in which almost everything - and certainly the vast majority of productive resources - is privately owned, and the Lockean injunction - “as much and as good” - has been violated, the relative property holdings of those who have and those who do not are the primary source of the power of the former over the latter and the primary source of all power (and concomitant relationships of

¹ Otto Kahn-Freund, *Labour and the Law*, Stevens and Son (1972), at 4.

² Kahn-Freund, note 1, at 4.

³ Kahn-Freund, note 1, at 15.

domination) based upon relative inequality. Given that not merely the existence of these rights (one owns an item of property if and only if the law recognises that person as the owner) but also the specific conditions of ownership (what one can and cannot do with one's own property) is an artefact of law, we can see that it is the law which determines, in the first place, the relative power of management and labour. To be clear: not all of the power which exists in society derives from law, but a significant, perhaps decisive, fraction, does so derive, and that fraction is, by nature of its source, uniquely amenable to restraint through law. What the law can do only with difficulty elsewhere, it can do with relative ease within the domain of its own construction. To see why, we must connect back together some of our earlier themes - the idea that law is logically anterior to the existence of an organised public power (whose deployment it determines), and the notion that property is defined by a willingness to interfere on the part of the owner against the non-owner - in order to answer our earlier question as to the possibility of consent justifying the particular scheme of interferences which exist.

6.3.1 Weber, violence and private law

In his essay on the vocation of politics, Weber offered a tremendously influential definition of the state in terms of its means, and specifically its recourse to physical force:

“Violence is, of course, not the normal or sole means used by the state. There is no question of that. But it is the means *specific* to the state... In the past the most diverse kinds of association - beginning with the clan - have regarded physical violence as a quite normal instrument. Nowadays, by contrast, we have to say that a state is that human community which (successfully) lays claim to the *monopoly of legitimate physical violence* within a certain territory.”⁴

Leaving aside the use of force against external agencies, whether waging war abroad or a defensive campaign at home, Weber's definition is most obviously correct when considering the criminal law, which determines the conditions under which the force on which the state

⁴ Max Weber, *The Profession and Vocation of Politics*, in Peter Lassman and Ronald Speirs (eds.), *Max Weber: Political Writings*, Cambridge University Press (1994), at 309.

has a monopoly will be deployed against individuals in the public's name. At this stage it remains true that the violence not only belongs to the state, as Weber suggests, but also that it is exercised for the state's own purposes: to protect something that the state claims represents the public interest as a discrete phenomenon, or private interests to the extent that it is necessary to promote that same public interest. That the 'public' interest in practice correlates strongly with the interests of certain groups in society, notably the property-owning classes, threatens to undermine this description only at the point at which legitimacy is invoked; it does not render inaccurate the description of the use of force nor the fact of the claim to legitimacy.

But this monopoly on violence is not confined to making sense of criminal sanction. It is useful too in understanding the nature of public and private law respectively, as long as it is understood that the violence in question, the actual use of force, includes a more general low-level threat of coercion that is encountered by the individual day to day to which actual force acts as a backstop. Weber's definition connects the state's own claim to legitimate violence to the use of violence by others: the state's monopoly is over the 'right' to employ violence, rather than its actual use - it does not prevent others from employing force, but demands that they do so only with its acquiescence: "the specific feature of the present is that the right to use physical violence is attributed to any and all other associations or individuals only to the extent that the *state* for its part permits this to happen. The state is... the sole source of the 'right' to use violence."⁵ The state which deploys its monopoly on the use of force for the public good via the criminal law also 'lends' it to private parties to use one against the other.

Let us be clear about the nature of this claim, linking it back to the hypothetical state of nature. Not only does a system for the regularized exercise of public power deploy that power in pursuit of the public interest, but it is a characteristic feature of the modern (well-functioning) state that the existence of such power excludes resort to force by any other agent *except* to the extent sanctioned by the state. Such sanctioning - the specific acquiescence to or assistance in the use of force by the state - takes place in the first place through its legal system. The principal example of the state doing so is not, however, as Weber seems to suggest, the situation in which the private individual him or herself uses force on the say-so of the state, which identifies that specific act of violence as legitimate. This is negative sanctioning: one individual kills another in self-defence and the state chooses not to punish

⁵ Weber, note 4, at 309-10.

the act, thus giving it the mark of legitimacy which is the sole preserve of the state. This is perhaps the most important example only where ‘violence’ is used in its broader sense.

Where the monopoly on legitimate violence is instead understood more loosely as coercion backed by the (ultimate and frequently uninvoked) use of force, the state’s primary method of attribution of the right to use force against one’s fellow man is through private law rights and obligations: the willingness to interfere on the part of owners against non-owners which G.A. Cohen argued is central to the existence of private property. Seen in this light, the ordinary private law determines in the first place the conditions under which the state will lend its monopoly on the legitimate use of violence to private parties for use horizontally, determining when there will be interference and, conversely, when there will be non-interference. We have, in this and preceding chapters made this argument in relation to property, the law on which permits us to identify the parties on whose behalf, as well as the conditions under which, the coercive apparatus of the state - the mechanisms through which it deploys its monopoly on the legitimate use of violence - will intervene. But we have extended that analysis to the laws on divorce and its effect upon certain aspects of labour law. In each, the parties interact in a conditioned by a knowledge of and belief about what they can and can not lawfully do; when the state’s coercive apparatus will intervene and on whose behalf.

6.3.2 Property as sovereignty

Given this gloss, Weber’s argument finds a later echo in the work of Morris Cohen, who identifies property with ‘sovereignty.’⁶ Property, he says, “is a relation not between an owner and a thing, but between the owner and other individuals in relation to things.”⁷ Specifically, “the essence of private power is always the right to exclude others.” To overcome that exclusion, one must either ‘overcome’ the law (by breaking it) or ‘overcome’ the owner, by giving him what he wants in return:

⁶ Morris Cohen, *Property and Sovereignty*, (1927) 13 Cornell Law Quarterly 8. Horwitz declares it a “major contribution to the disintegration of the orthodox distinction between public and private law.” Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy*, Oxford University press (1992), at 165.

⁷ Cohen, note 6, at 12.

“If, then, somebody wants to use the food, the house, the land, or the plough that the law calls mine, he has to get my consent. To the extent that these things are necessary to the life of my neighbor, the law thus confers on me a power, limited but real, to make him do what I want.”⁸

Cohen’s account of property takes what is latent in Weber’s account of the state - that it lends that force to others via its own coercive apparatus - and adds something to it. The fact that behind private property lies the monopoly of force does not mean that one is a priori prevented from obtaining it: the relationship between individuals and things is not eternally binary. Instead, the fact that the sovereignty of the state is, through property, delegated or lent to the individual, permits the ‘sovereign’ individual a leverage that he, absent public power, could not achieve. Property functions to put state power at the disposal of private parties against other private parties, not just in terms of excluding them from accessing or exploiting that property but, as a derivative, in arms-length interactions between owner and non-owner. The differential interferences, as determined by law, constitute a power that is, in its primary orientation, horizontal. Cohen, “summarizing almost a generation of American legal and social thought emphasizing the coercive character of property,”⁹ thereby provides a basis for understanding how the public power inherent in the constitution and protection of property becomes relevant to the horizontal freedom of private individuals.

6.3.3 From property to rights

In the hands of Cohen’s son, Felix, this argument is extended to the question of legal rights and concepts generally, becoming a critique of the ‘transcendental nonsense’ associated with discussion thereof. Just as there was no special, pre-existing characteristic of property which resulted in its being recognized as such by the courts - in the context of intellectual property, “[l]egal language portrays courts as examining commercial words and finding, somewhere inhering in them, *property rights*”¹⁰ - so too with concepts such as ‘fair value’ and ‘due process,’ which are discussed as though they have some existence apart from law to which

⁸ Cohen, note 6, at 12.

⁹ Horwitz, note 6, at 165.

¹⁰ Felix Cohen, *Transcendental nonsense and the Functional Approach*, (1935) 35 Columbia Law Review 809, at 815.

the law must then necessarily refer. But these are merely examples of a process which pervades legal discourse:

“In every field of law we should find peculiar concepts which are not defined either in terms of empirical fact or in terms of ethics but which are used to answer empirical and ethical questions alike, and thus bar the way to intelligent investigation of social fact and social policy... Legal arguments couched in these terms are necessarily circular, since these terms are themselves creations of law, and such arguments add precisely as much to our knowledge as Moliere's physician's discovery that opium puts men to sleep because it contains a dormitive principle.”¹¹

The argument that property is a delegation of sovereignty is thereby reconceptualised to demonstrate that not just property but legal concepts generally cannot be made sense of apart from the question of sovereignty and its delegation: property is the name we give to those circumstances in which the law permits the delegation of public power. We can define property only through induction - the identification of and generalization from those circumstances in which the courts put the public power at the service of private actors against other private actors. Felix Cohen identified a series of legal writers who realized this and so rejected the “traditional legal thought-ways” and their reliance on “legal magic and word-jugglery.”¹² The method which united them he called the ‘functional approach’ and was deployed to redefine law - most famously by Holmes as the “prophecies of what the courts will do in fact”¹³ - to query the nature of rules, which when washed “in cynical acid” can, like all other legal problems, “be thus interpreted as a question concerning the positive behavior of judges,”¹⁴ and to explain and critique legal decisions. This last use is of interest here, for it is ambiguous in a fashion relevant to the account of the nature of private law so far advanced. The fact of predicting what the behaviour of judges does not imply that a judge will in fact be called upon to decide the issue in question: often the issue will be so well understood that there is no need for litigation to know what the outcome will be. Among the many factors

¹¹ Cohen, note 10, at 820.

¹² Cohen, note 10, at 821. The writers in question were Holmes, Gray, Pound, Brooks, Adams, M.R. Cohen, T.R. Powell, Cook, Oliphant, Moore, Radin, Llewellyn, Yntema and Frank.

¹³ Oliver Wendell Holmes, *Path of the Law*, (1897) 10 Harvard Law Review 457, at 461.

¹⁴ Cohen, note 10, at 840.

influencing my decision not to steal my neighbour's car is the (certain) knowledge that the judge, applying the relevant law, will find that it is his, not mine, and that my taking of it amounts to theft: I will find myself confronted by the coercive apparatus of the state - the legitimate use of the violence its monopoly on which Weber used to define it. Judges, applying the law, determine the circumstances in which public power will be brought to bear, but most of what we need to know about those circumstances can be known independently of any judicial decision-making. Not only is property sovereignty, but the question of what is property is not determined by anything outside of law.

6.3.4 From power to consent

The two Cohens therefore exemplify a pragmatic approach which foreswears transcendentalism in legal concepts and suggests that the only way to define such concepts is on the basis of an inductive method which demonstrates formalist deduction to be frequently under-determined. Legal concepts, as 'identified' by courts, describe the circumstances in which, and the conditions under which, public power - sovereignty - will be put in the hands of private actors, rather than anything which physically exists in the world: the law determines how the state's monopoly on the legitimate use of violence is, in last resort, deployed, and the fact of such deployment is not determined by but in fact determines, the concepts which dominate legal discourse.

We have not yet progressed significantly from the account of property attributed to G.A. Cohen in chapter 4. We know that private property implies a standing willingness on the part of public power to intervene at the behest of one party (the owner) against all others (the non-owners) to the extent determined by the conditions of ownership, which like the issue of ownership itself is a question of law, and which are never absolute. We know also that this fact gives the party recognized as owner a certain leverage over the non-owner. The Weberian state, with its monopoly on violence, thus gives rise to a pervasive horizontal power - if not in the broad Foucauldian form, then certainly in one more complex than the top-down image of juridical power, to which Foucault sought to add disciplinary power and bio-power, would suggest.¹⁵ We stand at the same point at which we left Nozickian entitlement theory, which attempts to justify the distribution of property (and consequent

¹⁵ E.g., Michel Foucault, *The History of Sexuality: 1 - The Will to Knowledge*, Penguin Books (1998) at 135-43.

interference with the interests of others, such that interferences with owners are illegitimate, those with non-owners not) on the basis of the just acquisition and transfer of the property in question. We must determine whether the deployment of the state's coercive apparatus, the interferences by public power acting for private interests, can be rendered non-arbitrary and therefore irreproachable, by virtue of deriving from consent. In liberal, libertarian and neo-liberal perspectives, consent is of the highest priority - it alone is capable of rendering just alterations in the legal position of the individual: that he or she consents is usually held to preclude any intervention by the state (beyond that which, in securing property rights, is logically prior to any change of those rights, and that required in order to enforce the contracts which result from the mutual exercise of consent.) If property is sovereignty, can the power which the recognition of property by the state gives one man against all others be rendered non-arbitrary by consent? All turns on this.

6.3.5 Consent and coercion

This focus on freedom and consent - the use of the latter to justify both the interference with the former by horizontal parties and, more often, to demand non-interference by the state - was challenged by another of Felix Cohen's functional thinkers, the lawyer-economist Robert Hale. Hale painted a picture of law in which the idea that regulatory intervention of property rights was illegitimate was undermined by an account of property similar to Cohen's, conceiving of a right of property as involving a certain power over others on the part of the owner.¹⁶ If the former wishes to overcome the power of the owner, this latter is able to demand something in return:

“This power is a power to release a pressure which the law of property exerts on the liberty of others. If the pressure is great, the owner may be able to

¹⁶ Hale's principal works are: *Coercion and Distribution in a Supposedly Non-coercive State* (1923) 38 Political Science Quarterly 470; *Force and the State: A Comparison of 'Political' and 'Economic' Compulsion* (1935) 35 Columbia Law Review 149; *Bargaining Duress and Economic Liberty* (1943) 43 Columbia Law Review 603. The literature on Hale's life and work includes the following: Neil Duxbury, *Robert Hale and the Economy of Legal Force* (1990) 53 Modern Law Review 421; Warren J. Samuels, *The Economy as a System of Power and its Legal Bases: The Legal Economics of Robert Lee Hale*, (1973) 27 University of Miami Law Review 261; Barbara Fried, *The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement*, Harvard University Press (1998); Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, (1991) 15 Legal Studies Forum 327 (1991). Hale belongs resolutely to the aspect of legal realism which goes beyond the critique of formalism with which it has become associated, to encompass an “attack on the public/private distinction... [and] the idea of the self-regulating market.”: Joseph William Singer, *Legal Realism Now*, (1988) 76 California Law Review 465, at 375.

compel the others to pay him a big price for their release; if the pressure is slight, he can collect but a small income from his ownership. In either case, he is paid for releasing a pressure exerted by the government - the law. The law has delegated to him a discretionary power over the rights and duties of others.”¹⁷

This claim - that law grants a power in return for the non-exercise of which the owner can coerce some concession from non-owners - feeds into an argument about the supposed illegitimacy of coercion and the consequent need for a laissez-faire approach, as endorsed in *Lochner*, in which coercion is minimised; the *Lochner*-era dissents of Holmes “marked, for Hale, the demise of Spencerian economic austerity in the courts... [they were] tentative allusions to a broader anti-classical economic tradition” on which Hale drew.¹⁸ Coercion, Hale suggests, does not first arise when the two parties to a transaction, be they buyer and seller, employer and employee, etc., find their agreements limited by rules of general application which take precedence over what they would have otherwise agreed to do (as when the wage which the parties would have negotiated is substituted with a minimum wage set by the state or when, as in *Lochner*, a maximum length of working day is laid down in law) but instead is always already a feature of all negotiating which takes place within a legal system, whether or not there is an immediate, supervening action by the state:

“The owner can remove the legal duty under which the non-owner labors with respect to the owner's property. He can remove it, or keep it in force, at his discretion. To keep it in force may or may not have unpleasant consequences to the non-owner-consequences which spring from the law's creation of legal duty. To avoid these consequences, the non-owner may be willing to obey the will of the owner, provided that the obedience is not in itself more unpleasant than the consequences to be avoided... the conduct is motivated, not by any desire to do the act in question, but by a desire to escape a more disagreeable alternative”¹⁹

¹⁷ Robert Hale, *Rate Making and the Revision of the Property Concept*, (1922) 22 Columbia Law Review 209, at 214.

¹⁸ Neil Duxbury, *Patterns of American Jurisprudence*, Oxford University Press (1995), at 107-8.

¹⁹ Hale, *Coercion*, note 16, at 472.

From worker's point of view, this coercion is particularly acute: "He must eat. While there is no law against eating... there is a law which forbids him to eat any food which actually exists in the community - and that law is the law of property."²⁰ The effect is that, unless he can produce food of his own, "the law compels him to starve if he has no wages, and to go without wages unless he obeys the behests of some employer." Self-sufficiency is rendered difficult, if not impossible, by the same law of property, which forbids the individual from cultivating land he does not own.

The worker is in this way coerced into working by an employer who is able to exercise coercion in the specific form he does only because the law is as it is: the system of coercion is structured by law generally and underpinned by property law in particular. It will be remembered that the solution of the Republican party to the problem of unfree labor was to make grants of public land, thereby undoing the coercive hold of landowners over their labourers - Hale's account unpicks the logic of that solution. It also permits an answer out earlier question about coercion. The claim that the interference implied by property and the power it gives man over man can be justified on the basis that no changes are made to the circumstances under which public power will intervene, except to the extent agreed by the parties, does not hold up; that there is 'consent' does not mean there is no coercion and where there is coercion there is no a priori reason to respect the outcome of the process as morally justified (as does liberal thought) or as non-arbitrary and so not reductive of freedom.

6.3.6 The mutuality of coercion

The coercion Hale describes does not, however, act in one direction only: continuing with the example of employers, he notes that both those to whom they sell and those they employ can exercise a reciprocal coercion of their own, "the customers through their law-given power, to withhold access to their cash, the laborers through their *actual* power (neither created nor destroyed by law) to withhold their services."²¹ In each case, the employer is to a greater or

²⁰ Hale, *Coercion*, note 16, at 473. See also Morris Cohen, *The Basis of Contract*, (1933) 46 Harvard Law Review 553, at 569: "The working-man has no real power to negotiate or confer with the corporation as to the terms under which he will agree to work. He either decides to work under the conditions and schedule of wages fixed by the employer or else he is out of a job."

²¹ Hale, *Coercion*, note 16, at 474. As in the labor theory of value, labour is singled out as a contribution to the process, held to be sui generis; it does not owe its existence to law, though the conditions under which it may be sold, as well as the identity of those permitted to sell their labour, are eminently legal questions. In describing

lesser degree coerced to give them something of his own in order to overcome their coercive capacity. Where popular sentiment (and much economic theory) sees a system of free bargaining, a process separate from the state's influence (and all the better for it), Hale sees a process of mutual coercion made both possible and necessary by the law, which determines the conditions under which public power will intervene on behalf of each party against the other: I can force others to pay me if they wish to own or make use of my property because if they do not, the state will intervene to protect my interests; simultaneously, they attempt to coerce me into giving it up through use the options they have in terms of the property the law recognises to them and what it is that they are permitted to do with it. This recalls our point about the options available to husband and wife as set by the law on divorce and property, and points the way to the solution of unfree labor.

6.4 The law and coercion

The law, then, provides the backdrop to the bargaining power of individuals, the conditions of coercion. It determines the distribution of wealth, which “depends on the relative power of coercion which the different members of the community can exert against one another. Income is the price paid for not using one's coercive weapon”²² and the value of property, which is “is merely a measure of the strength of the bargaining power of the person who owns the one or renders the other, under the particular legal rights with which the law endows him, and the legal restrictions which it places on others.”²³ The role of law in conditioning coercive capacity therefore includes the creation of such fundamentals as the rules of property: the fact that the law will recognise property rights in something means that owners can rely on the power of the state to back up such rights. A contemporary example might be the increasing recognition of a right of privacy, which is accompanied by a legal remedy for breach of privacy: the individual can derive income by agreeing not to call upon this legal remedy. Where previously a newspaper which wanted to invade the privacy of an individual could either attempt to circumvent whatever barriers were erected by that individual knowing that to do so would not put them face to face with public power, which was usually agnostic as to the whole affair, the legal reconfiguration which means that a person taking the former

the coercive process as mutual or reciprocal, Hale was demonstrating greater insight than Cohen (see note 20) and so provides a basis for the rebalancing of the relationship.

²² Hale, *Coercion*, note 16, at 478.

²³ Hale, *BDEL*, note 16, at 625.

option risks finding himself on the wrong side of the law and thus the payment becomes necessary rather than optional - the conditions of coercion have changed and as the law expands its recognition of a wrong of invasion of privacy, one can expect the prices obtained by celebrities for allowing access to their private lives to increase. Restrictions about the sorts of private agreement the state will and will not enforce thus act to limit the agreements which private parties can make expecting public power to back their transaction. But not just restrictions - so too permissions, rules which permit certain conduct but which, in contrast with prohibitions, are often not thought of as rules at all, with the contrast that their distributional consequences escape scrutiny.²⁴ Reflection on this point makes clear that inaction is a policy, and the law is responsible for the outcome, at least in the abstract sense that the law “could have made it otherwise.”²⁵

We therefore find in Hale’s work both the idea of mutual and reciprocal coercion, and the idea that value of rights is a function of conditions of coercion - those options available to parties which will keep them on the right side of the law - which themselves are an artefact of law. Public and private cannot be kept separate, and laissez-faire, which claims to do so, is as much a regulatory system as any other.²⁶ The law, the body of rules which direct public power, is everywhere implicated in private relations, playing a far larger casual role than either liberalism or Marxism would normally admit.²⁷ Questions about the regulation of the market can “be answered only by reference to moral and policy considerations; they cannot be answered merely by reference to the general principles of private property or freedom of contract.”²⁸

6.4.1 Bargaining in the shadow of law

The result of a bargaining process is therefore not an instantiation of freedom, but the product of relative coercive capability as conditioned by the legal framework. Where a relationship of domination exists, it does so because of bargaining conditions put in place through law, which have effect against a background of property which is itself a more or less direct

²⁴ A central theme of Wesley Hohfeld’s *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, Yale University Press (1923).

²⁵ Kennedy, note 16, at 334.

²⁶ Singer, note 16, at 482-7.

²⁷ Kennedy, note 16, at 332.

²⁸ Singer, note 16, at 491.

function of law. There is nothing 'natural' about such relationships: they are a product of law, amenable to amelioration through law. The legal realist demand that law be considered as a policy instrument and studied in terms of its social effects cannot be denied. More importantly, we now see the difficulty with both liberal perspectives which seek to justify a given distribution of wealth and entitlements on the basis that it results from a series of exercises of the free will of individuals, including both the sort of Nozickean entitlement theory and Spencerian laissez-faire at issue in *Lochner* on one hand and, on the other, the claim floated earlier whereby the interference with the interests of non-owners which correlates with the non-interference with non-owners in a system of private property might be non-arbitrary (within the republican worldview) by reason of that pattern of interferences being the outcome of the free exercise of that same consent. The Halean account suggests that neither of these positions is sustainable. The 'consent' is no such thing, merely the result of mutual processes of coercion that are themselves determined by (a) the current distribution of wealth and entitlements, and (b) the coercive options open to each individual under the (contingent) legal rules which subsist at the time. It is not just a question of what I can do or not do lawfully at the present moment - it is an issue of what I can do it with; what assets are mine by law to leverage against you and what are yours to put to work in coercing me.

Public power, first justified herein on the basis of the unfreedom which would exist if it did not - the pure horizontal domination of a hypothetical state of nature - now itself grounds the (legitimate, irresistible) domination which might exist as a function of property holdings and the coercive capacity which follows from them. The claim to naturalism, that the outcome of free bargaining processes is to be protected, even revered, as the expression of individual autonomy, holds no water. Instead, all bargaining takes place in conditions under which the possibility of uncoerced consent is already circumscribed by law. The law, by protecting property, poisons all which comes after it, permitting those with property a greater range of coercive opportunities than those without and insulating them from the material needs which work to undermine the reciprocal coercive options available to these latter - the employee's option of withholding his or her labour means very little in a context in which the result will be starvation. In a world in which 'everything' is already owned, protected by the standing willingness of the state to intervene on behalf of its owner under the conditions specified by law, free consent is impossible, and what replaces it, mutual coercion, will work in favour of those who own the most. Particularly advantaged are those to whom we referred earlier, who

can meet their material needs without reference to others; who need not sell their labour to survive. Particularly disadvantaged are those who cannot meet their own material needs and so have little coercive capacity with which to resist that of those from whom they seek employment. None of this is inherent in the concept of property, and all of it is amenable to amendment through law:

“With different rules as to the assignment of property rights, particularly by way of inheritance or government grants, we could have just as little governmental interference with freedom of contract, but a very different pattern of economic relationships.”²⁹

One of the advantages claimed for public power is that it can enforce bargains which would not be enforced in the state of nature, but in the presence of that public power and the property regime it upholds, the state is everywhere already implicated. To then call for it to respect, on the logic of non-interference, the outcome of processes of coercion which it founds, is false and dangerous. It becomes paramount to ensure that the power in question does not force one to live at the mercy of another. Having rendered free, it must not be allowed to render unfree.

6.4.2 Law and domination

We arrive at a picture in which law sets the bargaining conditions of a horizontal relationship. Where that relationship is a dominating one - where one party can interfere arbitrarily with the interests of another - it is because of the asymmetric nature of the coercive tools available to each party, of which the most obvious will normally be a function of their respective property holdings. Conversely, where the law permits courses of action that attempt to even up the bargaining situation - by allowing, for example, the many workers the opportunity to combine and negotiate collectively and to take action up to and including that of striking in order that the otherwise insurmountable difference in strength between worker and employer is in part negated - it can undo such relationships. The question is not whether the law will be such as to involve public power; it is whether the involvement of public power will take place under conditions calculated to ossify, enhance or unravel relationships of domination.

²⁹ Hale, *BDEL*, note 16, at 628.

Pettit's claim, encountered earlier, that the distribution of property is akin to the natural environment when it is in fact man made and inescapably contingent therefore acts to underplay the relationship of unfreedom which can exist between employer and potential employee by disguising the role of public power in constituting the distribution of property (and other duties and entitlements) which acts as a frame to their negotiations. The claim too that a well-functioning market might avoid this situation by protecting the particular individual from domination by a similar potential employer is similarly fatuous:³⁰ even in these circumstances, the employee bargains on the basis of his resources and the resources which the law, by recognising them as the private property of others, keeps from him. In a well-functioning market, the relationship of unfreedom might be impersonal, applying as between the individual and the class of potential employers as a group rather than one of them in particular, but he lives no less at their mercy for that reason alone.³¹ He is often left to aspire to the status of 'wage slave', which if he is to achieve he must accept the conditions offered to him by he who is willing to buy his labour - a form of unfreedom compounded by the dual neo-liberal prongs of reduced social safety nets and reduced regulation of the conditions upon which employment can lawfully take place: minimum wage laws can therefore be understood as having the effect of ensuring that the potential employee, in thrall to those who have employment to offer, does not live entirely at their mercy, as the Lochner-style focus on formal equality would encourage.

6.5 The freedom of employees

The individual is at the mercy of the class of potential employers because the law of property prevents him from fulfilling his material needs and thereby facilitates the process by which potential employers are able to coerce him into accepting employment upon terms which he

³⁰ Philip Pettit, *Freedom in the Market*, (2005) 5 Politics Philosophy Economics 131, at 142.

³¹ Gaus suggest that neo-republicanism's criticism of the market, that it "is characterized by an imbalance of power, and so it is a realm of unfreedom; that it takes for granted people's preferences, but that these are often nonautonomous and run contrary to the agent's own best interest; and that it allows trades that ought not - indeed, rationally cannot - be made" constitutes "a rejection of the market as a general model of worthy social intercourse." Gerald F. Gaus, *Backwards Into The Future: Neorepublicanism as a Postsocialist Critique of Market Society*, (2003) 20 Social Philosophy and Policy 59, at 90. This is incorrect: what they do is demonstrate that the market does not necessarily promote freedom and so has no inherent moral value; there is, therefore, no problem with 'interfering' with the market's operation. Republicanism can and often does accept the instrumental value of the market: see, e.g., Richard Dagger, *Neo-republicanism and the Civic Economy*, (2006) 5 Politics, Philosophy & Economics 151.

would not otherwise accept. That he is not required to work for starvation wages is a function of laws diametrically opposed to the logic of Lochner-era laissez-faire. But this situation of domination does not end when the range of potential employers is closed off through the crystallisation of a contractual relationship between an individual and an employer. The involvement of the law in determining whether the relationship one of domination or not does not cease. Instead it continues, though between the parties to the employment relationship and the background of property we have interposed the law of contract and the body of rules known as labour law. We will consider it along two related axes which are central to the question of whether or not the employee, having assumed that status, comes to live at the mercy not, any longer, of the category of potential employers, but of his or her specific employer. The first is the conditions under which employment can be lawfully terminated. That such rule is relevant to freedom will be readily appreciated upon consideration of the situation at the extreme end of the available spectrum - so-called 'at will' employment, which can be terminated at any time and for any reason. In this case, the employee is truly at the mercy of his or her employer, obliged to tolerate what would otherwise be intolerable; to deny him or herself for fear of upsetting the person on whose contingent good grace he or she is entirely dependent. The second axis concerns the actions the law permits employees to take in order to redress the almost inevitable imbalance which exists between them and employers and so, hopefully, to rebalance the relationship away from being one of unfreedom in which neither party can interfere arbitrarily with the interests of the other without infringing the law: industrial action generally, and the right to strike in particular.

6.5.1 Ending employment

Dismissal matters. It "deprives individual workers of their major source of income and [and] of membership of the most significant community in their life... in many instances, the disciplinary power of an employer is equivalent or greater in its effects to that exercised by the criminal courts."³² In the United States, where "unlike almost every other industrialized country" there has never been "a general protection against unfair dismissal or discharge without just cause, nor even any period of notice," the effect has been that of "endowing

³² Hugh Collins, *Justice in Dismissal*, Clarendon Press (1992), at 2.

employers with divine rights over their employees.”³³ The emergence of the at will doctrine in an 1877 treatise was accepted “without question or discussion,”³⁴ variously attributed to its coincidence with the laissez-faire orthodoxy of the time³⁵ or as capitalist resistance to the emergence of a managerial class which threatened its interests.³⁶ The rule now functions according statutory exceptions, both state and federal, and three major common law exceptions - that the employee is wrongfully discharged when it is contrary to a public policy of the state as found in “a State constitution, statute or administrative rule.”³⁷; when the facts of employment give rise to an implied contract of employment between employer and employee of which dismissal is in breach; and where a ‘covenant of good faith’ is read into the employment relationships, such that either dismissal requires ‘just cause’ or that bad faith terminations are unlawful.³⁸ These three exceptions are recognised in progressively fewer states, with some recognising none. Dealings between employer and employee are structured by the knowledge that the employment relationship can be ended at any time, for (almost) any reason. The employee enjoys no psychological security whatsoever and, combined with the traditionally lesser level of social protection available in the United States, there is much reason to be concerned for the freedom of the individual in relation to his or her employer. It is correct, of course, that at will employment works in both directions, that the same doctrine which permits employers to dismiss employees without reason or notice will allow employees to walk away from their employment at the time and for the reason of their choosing: the options open to each within the Haeian process of mutual coercion are formally symmetrical. And, indeed, in a select few cases, probably highly-skilled workers, it is foreseeable that this would work to their advantage; to place them in a position to interfere with their employer’s interests on an arbitrary basis. Nevertheless, such cases must by definition be exceptional - the distribution of property and the nature of the labour market - particularly where price stability has replaced full employment as the primary macroeconomic goal - are such that this will work against the individual far more often than it will work in his favour. Further, the degree of interference which an individual can perpetrate against a corporate entity - even

³³ Clyde W. Summers, *Employment at will in the United States: The Divine Right of Employers*, (2000) 3 University of Pennsylvania Journal of Labor and Employment Law 65, at 65.

³⁴ Summers, note 33, at 68.

³⁵ Mary Ann Glendon and Edward R. Lev, *Changes in the Bonding of the Employment Relationship: An Essay on the New Property*, (1978) 20 Boston College Law Review 457.

³⁶ Jay Feinman, *The Development of the Employment At Will Rule*, (1976) The American Journal of Legal History 118.

³⁷ Charles J. Muhl, *The Employment-at-Will Doctrine: Three Major Exceptions*, (2001) 124 Monthly Labor Review 3.

³⁸ Muhl, note 37, at 10.

where the doctrine works in his or her favour - is likely to be significantly less than can be perpetrated upon the individual.

If at will employment - that which can be ended unilaterally by the employer - stands at one end of our spectrum, at the other would be that which cannot be ended at all or, more realistically, which can be ended only with the consent of the employee. In the former case, the relationship is one of domination in the manner suggested by Pettit's re-reading of Sandel's account of labor republicanism: the employer is left with a broad ability to interfere with the interests of the employee who, like the slave with the benevolent master, knows what is necessary to avoid incurring the wrath of the party upon whom he is effectively reliant in order to continue to meet his material needs.³⁹ To the advantages commonly identified for at will employment - its motivating effect upon employees, the flexibility it permits employers and the low cost of administering a system in which dismissal cannot be challenged - we must oppose the implications for the freedom of the employee in relation to the employer.⁴⁰ In the latter, the relationship is reversed, though the extent of the interference which the employee can perpetrate is never likely to be as great: an employee not working does not usually rank alongside an employee being summarily dismissed. In seeking to balance out the relationship between the two, such that neither lives at the mercy of the other would hope to find a body of legal rules which stand somewhere between the two extremes.

We can distinguish between procedural and substantive aspects of the dismissal process. Insistence upon correct process is a good - for correct process excludes some of the most common forms of arbitrariness - but we can only ensure that the interference in question (the

³⁹ This might also be politically problematic - "in circumstances of genuine market vulnerability, a worker might withdraw from political participation for fear of offending her employer. Or else she might feel compelled to support participation in ways that do not track her genuine judgment of what promotes the common good. Stuart White, *The Republican Critique of Capitalism*, (2011) 14 *Critical Review of International Social and Political Philosophy* 561, at 571. This might prevent the participation of workers in the political process from having the emancipatory effect it would were their political decisions entirely independent.

⁴⁰ Richard Epstein, *In Defence of the Contract at Will* (1984) 51 *University of Chicago Law Review* 947. See also Richard Posner, *Overcoming Law*, Harvard University Press (1995), at 299-311. The immediate context of Posner's consideration of the issue is Drucilla Cornell's Hegelian critique of Epstein (in her *Dialogic Reciprocity and the Critique of Employment at Will* (1989) 10 *Cardozo Law Review* 1575). Posner grants Cornell the Hegelian claim that "individualism... is socially constructed rather than presocial... [for] the natural state of human beings is not one of equality but of dependence on more powerful beings," a claim like that advanced in the present works' consideration of the state of nature device in chapter 2. The upshot, for Posner, is that "freedom of contract... cannot be defended persuasively by reference to natural liberty" (at 200-301). Posner therefore defends it instead on the basis of an analysis of the economic consequences of abandoning employment at will.

termination of the employment relationship) is not arbitrary through control of its motive.⁴¹ The relevant convention of the International Labour Organisation (not ratified by the United Kingdom)⁴² requires that employment not be terminated “unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service,”⁴³ thereby constituting ‘capacity,’ ‘conduct’ and ‘operational requirements’ as the three grounds upon which employment can legitimately be terminated. It also provides a non-exhaustive list of reasons which are not valid grounds upon which to terminate employment - membership of a union or participation in its activities; seeking to vindicate one’s legal rights; “race, colour, sex, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin”; taking maternity leave⁴⁴ - and requires that a dismissal be challengeable before a “court, labour tribunal, arbitration committee or arbitrator.”⁴⁵ A suitable remedy - either declaration that the termination is invalid and/or reinstatement or compensation, in that order of priority - must be available.⁴⁶ These dual requirements of good cause and the possibility of legal challenge would significantly rebalance the employer-employee relationship in comparison to strict at will employment; the employer’s sharpest coercive tool - the termination of the employment relationship - is blunted by a legal rule which means liability will arise from its use other than under the specific conditions laid down. The possibility that the employee is required to live at the mercy of his employer would be commensurately reduced.

English law distinguishes wrongful from unfair dismissal: the former term indicates that dismissal has taken place in breach of the contract between employer and employee; the latter indicates that it was in breach of the applicable statutory protections.⁴⁷ Though the two types of claim coexist, the former is limited by the express terms of the contract and anything that the common law implies or statute writes into it. The common law recognises, for example,

⁴¹ Ann Davies, *Perspectives on Labour Law*, Cambridge University press (2004), at 159.

⁴² Termination of Employment Convention, 1982 (No. 158).

⁴³ Article 4.

⁴⁴ Article 5

⁴⁵ Article 8

⁴⁶ Article 10.

⁴⁷ For background to the introduction into law of unfair dismissal rules, see Paul Davies and Mark Freedland, *Labour Legislation and Public Policy: A Contemporary History*, Clarendon Press (1993), at 194-211. The authors identify two reasons for the widespread support given to legislative intervention in an environment otherwise dominated by laissez-faire: the number of strikes for which the catalyst was dismissals and the vastly greater consequences for a dismissed employee than for an employer whose employee resigns (at 200-202).

an implied contractual term to the effect that reasonable notice of dismissal must be given.⁴⁸ For the purposes of unfair dismissal, substantive reasons are divided between those which are automatically unfair, potentially fair, and automatically fair. The middle category includes conduct, capability, redundancy and “some other substantial reason” and permits dismissal only if the employer acts reasonably. Statutory notice requirements apply;⁴⁹ statutory disciplinary and grievance procedures which, by virtue of the Employment Act 2002 were inserted into all contracts of employment were repealed by the Employment Act 2008,⁵⁰ Remedies for unfair dismissal include reinstatement⁵¹ or re-engagement in comparable employment.⁵²

The coexistence of contractual and statutory grounds for challenging a dismissal underlies once again that there does not exist an intervention/non-intervention dichotomy, such that the possibility of a challenge on statutory grounds interposes the state between employer and employee in a relationship that would otherwise be ‘pure’, unsullied by the supposedly freedom-reducing use of public power. Instead, public power is always already implicated, inseparable from the specific contractual agreement between the parties which it will be expected to enforce and the background system of property relations against which the contract in question was formed. The availability of statutory grounds of challenge merely extends the contractual protection, reflecting the fact that the employee’ bargaining position in relation to the employer will normally be such that the employee is unlikely to achieve a level of contractual protection that will work to remove the employer from a position of domination over him. The statutory provisions therefore promote freedom as non-domination *not* by permitting challenge where none would otherwise be available, and *not* by having the state intervene where it would otherwise not, but instead by changing the conditions under which power (already an inextricable part of this whole relation) will effect a direct intervention. Public power - the state and its coercive apparatus whose deployment is governed by law - is implicated in the existence of relationships of domination, and so where the conditions of its deployment change, freedom can be promoted.

⁴⁸ See, e.g., *Reda v Flag Limited* [2002] UKPC 38, at [57] per Lord Millett.

⁴⁹ Employment Rights Act 1996, s.86.

⁵⁰ Employment Act 2002 s.29-33; Employment Act 2008 s.1.

⁵¹ Employment Rights Act 1996, s.114.

⁵² Employment Rights Act 1996, s.115.

6.5.2 The ‘right’ to strike at common law

Once legal protection against arbitrary dismissal is accounted for, it falls to consider the tools which the law permits to each party in within their coercive bargaining. In recognition of the fact that an individual acting alone will struggle to exert a level of coercion at all capable of cancelling out or even overcoming the coercive tools available to the employer to use against him or her - the withdrawal of labour individually working against, rather than for, his interests - the rebalancing of the relationship will normally require that employees be permitted to act in concert. The primary coercive mechanism has therefore traditionally been the right to strike. At common law, a strike involves a breach of contract by the employee striking,⁵³ while calling on others to strike amounts to the common law tort of inducement to breach a contract of service:

“A person who wrongfully and maliciously.... interrupts the relation subsisting between master and servant by procuring the servant to depart from his master’s service... commits a wrongful act for which he is responsible at law.”⁵⁴

Alongside this tort, that of conspiracy to injure was suitable for application in circumstances where there did not exist a contract between those taking industrial action and those harmed by it.⁵⁵ The work of unions in promoting the welfare of their members was undermined by the imposition on them of vicarious liability for any of their agents who might have committed these or other torts in the course of organising a strike or other industrial action.⁵⁶

⁵³ As, Ewing suggests, will most industrial action short of a strike “for so wide will be the powers of the employer under the express and implied terms of the contract of employment.” Keith Ewing, *The Right to Strike*, Oxford University Press (1991), at 9. This does not mean, however, that an employee can be dismissed for taking strike action, which would have been the case at common law. Under the Trade Union and Labour Relations (Consolidation) Act 1992, as amended, the dismissal of an employee during the first 8 weeks of a strike which falls within statutory protection of the union and follows a ballot, is automatically unfair (s.238A).

⁵⁴ *Lumley v Gye* (1853) 2 E&B 216, at 224.

⁵⁵ *Quinn v Leatham* [1901] AC 495 (HL). For recent reflections, see John McIlroy, *The Belfast Butchers: Quinn v Leatham After a Hundred Years*, in Keith Ewing (Ed.) *The Right to Strike: From the Trade Disputes Act 1906 to a Trade Union Freedom Bill 2006*, The Employment Rights Society (2006).

⁵⁶ *Taff Vale Railway Co v Amalgamated Society of Railway Servants* [1901] AC 426. The decision in the Taff Vale case was a central reason behind the eventual formation of the Labour Party in 1906. Laski put it together with *Roberts v. Hopwood* [1925] AC 578 as “examples of an outlook which seeks to insist that views not cherished by the Court shall not, for reasons which it is difficult to term judicial, find the avenue of legality open to them. [In both cases] the decisions of the Lords... did more than any propaganda could have done to

Indeed, the actions of trade unions were likely to constitute criminal rather than mere civil wrong until the Conspiracy and Protection of Property Act 1875 which decriminalised any “agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen” where the act, if done by an individual, would not be criminal.⁵⁷ This effected a substitution of the form - civil for criminal - in which striking workers would encounter the coercive apparatus of the state, but left intact the law on “riot, unlawful assembly, breach of the peace, or sedition, or any offence against the State or the Sovereign” which acted to bound the forms of lawful action by striking workers.⁵⁸

The prospects for any action which might permit the employees acting together, to exercise a level of mutual Haeleian coercion against the employer capable of redressing the imbalance created by his considerable coercion over them - work or starve! - were thus poor: the deployment of their most potent weapon put them at odds with the law, which took the side of their employer, as it took the side of property owners against them when they attempted to meet their material needs directly. For this reason, they must frequently have lived at the mercy of those who employed them, accepting their lot, on the basis that no man acting individually enjoyed the necessary leverage to resist arbitrary interference. There is no ‘natural’ pre-legal extent of coercion which can be privileged for that reason; the contingent legal rules which existed reflected a policy perspective which strongly privileged the interests of organised capital.

6.5.3 Statutory departure

In 1906, the newly elected Liberal government legislated to provide legal immunity to trade unions taking industrial action, such that public power would not be made available on the part of employers against employees and trade union officials in relation to what the common law recognised as conspiracy:

strengthen the theses they were intended to destroy.” Harold J. Laski, *Judicial Review of Social Policy in England: A Study of Roberts v. Hopwood et al.*, (1926) 39 Harvard Law Review 832, at 847.

⁵⁷ Conspiracy and Protection of Property Act 1875, s.1.

⁵⁸ Conspiracy and Protection of Property Act 1875, s.1.

“An act done in pursuance of an agreement or combination of by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act if done without any such agreement or combination would be actionable.”⁵⁹

No longer would otherwise lawful activity attract civil liability merely because it involved co-ordinated action between multiple persons: the individual could through combination transcend the limits to his individual coercive capacity. Similarly, inducement to breach contract and interference with trade were rendered non-actionable, and trade union funds given significant protection against the liability established by the Taff Vale case.⁶⁰ Though it by no means introduced a regularised system for the pursuit of industrial action, the removal of these liabilities through the introduction of (their Hohfeldian jural opposite) an immunity for striking workers had the effect of reducing the range of actions which brought those workers into confrontation with the system of public power and, consequently, of increasing their freedom with regard to their employers. The balance of mutual coercion described by Hale had tipped back towards them, lessening the capacity of the employers to arbitrarily interfere with their interests. Here, by staying its hand in a context where it previously worked to oppose trade union activity, the state tacitly endorses that activity and renders the worker more free in relation to his employer. Questions of ‘ordinary’ law are shown again to be central to individual (republican) freedom.

There was not, notably, any legal ‘right’ to strike, an absence explained as being consequent upon the very late formation of a political party directly allied to the labour movement - in the absence of such a party “a largely non-ideological trade union movement asked for and obtained simply the removal of the obstacles to unrestricted operation of the collective bargaining system.”⁶¹ Though such a right would have been no more secure against legislative caprice than is any other in the context of Parliamentary supremacy, it would have rendered more difficult subsequent judicial attempts to turn back the tide of emancipatory

⁵⁹ Trade Disputes Act 1906, s.5.

⁶⁰ Above, note 56. The nature of what was done by the 1906 Act was later characterised by Lord Denning in the following terms: “When Parliament granted immunities to the leaders of trade unions, it did not give them any *rights*, it did not give them a *right* to break the law or to do wrong by inducing people to break contracts. It only gave them immunity if they did,” a fact which was to influence his later interpretation of an equivalent provision: “the words of the statute are not to be construed widely so as to give unlimited immunity to lawbreakers.” See *Express Newspapers Ltd. v Mcshane* [1979] 1 W.L.R. 390, at 395.

⁶¹ Davies and Freedland, note 47, at 369.

developments. This system of statutory immunity for enumerated common law torts was particularly problematic when juxtaposed with the curious pace of common law evolution. In *Rookes v Barnard*, the House of Lords “reinvented”⁶² the tort of intimidation, constituted here by the union using “a threat to break their contracts with their employer as a weapon to make him do something which he was lawfully entitled to do but which they knew would cause loss to the plaintiff.”⁶³ Rookes had been a draughtsman working for the British Overseas Airways Corporation in a closed shop. He left his union, which threatened to strike if BOAC did not end his employment with them: BOAC did so, entirely lawfully, and Rookes, having no recourse to law against it, instead sought damages from the union’s officials. Lord Reid stated that:

“Intimidation of any kind appears to me highly objectionable. The law was not slow to prevent it when violence or threats of violence were the most effective means. Now the subtle means are at least as equally effective I see no reason why the law should turn a blind eye to them. We have to tolerate intimidation by means which have been held to be lawful but these I would stop.”⁶⁴

The Halean rejoinder is obvious: this perspective sees only the coercion of one party, ignoring that the very contract of employment is based upon a mutual relationship of coercion - the workers may attempt to ‘intimidate’ their employer into taking action he is lawfully permitted to do, but so does their employer ‘intimidate’ them into working for him knowing that the alternative is less pleasant. Given that usually an employer will possess capital and the employee not, it is reasonable for the law to permit to the worker a broader spectrum of coercion where to do so works in favour of the dominated rather than the dominating party. In their decision here “the Law Lords changed the law as radically in the complex fields of industrial relations as any statute.”⁶⁵ Its effect was reversed by the Labour Government’s Trade Disputes Act 1965.

⁶² Ewing, note 53, at 6.

⁶³ *Rookes v Barnard* [1964] AC 1129, at 1167. Had the threats been to take unlawful action (such as the use of violence) rather than to (lawfully) strike, then the actions of the union officials would have constituted criminal intimidation.

⁶⁴ *Rookes v Barnard and Others* [1964] A.C. 1129, at 1169.

⁶⁵ John Griffith, *Judicial Politics Since 1920*, Blackwell (1993), at 97. Griffith notes a second decision, *Stratford v Linley* [1965] AC 269, decided just six months later, where the House of Lords, again reversing the Court of Appeal, limited further the immunity provided by the 1906 Act by classifying what was ostensibly a trade

Again, in *Torquay Hotel Co v Cousins*, the Court of Appeal limited the meaning of ‘trade dispute’ in the context of establishing immunity for an economic tort. Lord Denning, speaking more broadly than the rest of the court, was willing to extend the *Lumley and Gye* principle to “deliberate and direct interference with a contract without that causing any breach.”⁶⁶ In 1974, the Trade Union and Labour Relations Act recast the by now traditional immunity in light of the ever-expanding range of relevant torts recognised by the common law. This process continued through the 1980s.⁶⁷ The current law in this area is found in the Trade Dispute and Labour Relations (Consolidation) Act 1992 (TULRCA) which re-enacts a variant of the famous provision of the 1906 Act, influenced by the specific form it took in the 1974 Act yet less generous with its immunity.⁶⁸ Section 244 of TULRCA defines a trade dispute, requiring that the dispute be “between workers and their employer,” and defining it such that it is insufficient for the dispute to relate to one of the specified topics (which include *inter alia* the terms and conditions of employment and the engagement and dismissal of employee). Instead, the dispute, in order to achieve the status of a ‘trade dispute’ and the possibility of immunity, must relate ‘wholly or mainly’ one of these topics, such that where a strike takes place against a political background to which an issue of employment conditions acts as the metaphorical straw for the camel’s back, then there exists a real risk that the strike will not be protected. The extended range of coercive mechanisms is available only in specific circumstances, meaning that even if the direct employer-employee relationship is altered in its equilibrium, the employee will be less well protected in his dealings with those other parties with whom his fate is bound up in modern society.

6.6 Justifying the right to strike

Labour law traditionally struggles with the question of exactly how to justify the right to strike - on what basis it is a good to be protected or enhanced? Laski framed it in terms of the needs of workers to draw attention to their cause, a requirement which makes the inconvenience caused central to, rather than mere by-product of, the strike action:

dispute as an inter-union dispute (which did not qualify for the statutory immunity), again demonstrating the disadvantages from a trade union point of view of a statutory system of ad hoc and partial immunities (at 98).

⁶⁶ *Torquay Hotel Co v Cousins* [1969] 2 Ch 106, at 138.

⁶⁷ In, for example, *Merkur Island Shipping Corp. v Laughton* [1983] 2 A.C. 570 and *Barretts & Baird (Wholesale) Ltd v Institution of Professional Civil Servants* [1987] IRLR 3.

⁶⁸ TULRCA s.219.

“When trade unions seek for what they regard as justice, one of their most powerful sources of strength is the awakening of the slow and inert public to a sense of the position... to do this, in a real world, it must inconvenience the public, that awkward giant has no sense of its obligations until it is made uncomfortable.”⁶⁹

The right to strike is thus a right to cause inconvenience for the sake of publicity. To resist it for the sake of public convenience is to give life, Laski suggests, to a form of “industrial servitude.” Anne Davies, canvassing different modes of justification, has noted that, although industrial action has no direct economic benefits of its own (defined, presumably, from the perspective of efficiency), it is central to the process of collective bargaining,⁷⁰ and so economists who “see collective bargaining as damaging to firms because it enables workers to extract excessive pay rises are opposed to industrial action” while, on the other hand “[t]hose who see collective bargaining as beneficial are more tolerant of industrial action.”⁷¹ Rights-based approaches make a more positive case for industrial action and a right to strike is recognised by several international instruments which, however, to the extent that the link the right to strike to processes of collective bargaining, impliedly place certain limits upon the reasons for which the right can be exercise and the identity of those who can enjoy it.⁷²

The right to strike is not explicitly protected by the ECHR and its relationship with the most obvious place for it - the right to freedom of assembly under Article 11 - has traditionally been complex. In *Demir and Baykara v Turkey*,⁷³ however, the Grand Chamber noted that where it had originally held that “Article 11 did not secure any particular treatment of trade unions, such as a right for them to enter into collective agreements,”⁷⁴ its own case law was marked by two evolutionary principles: taking into consideration “the totality of the measures

⁶⁹ Harold Laski, *Liberty in the Modern State*, Harper (1931), at 141.

⁷⁰ Under which heading it is found within the European Social Charter, Article 6 of which states that “[w]ith a view to ensuring the effective exercise of the right to bargain collectively,” the parties to it undertake to recognise “the right of workers and employers to collective action in cases of conflicts of interest, including the right to strike, subject to obligations that might arise out of collective agreements previously entered into.” There is also Lord Wright’s pronouncement that “The right of workmen to strike is an essential element in the principle of collective bargaining.” *Crofter Hand Woven Harris Tweed v Veitch* [1942] AC 435, at 463.

⁷¹ Davies, note 41, at 218.

⁷² Davies, note 41, at 219-220.

⁷³ (2009) 48 EHRR 54.

⁷⁴ (2009) 48 EHRR 54, at [142], citing to *Swedish Engine Drivers’ Union v Sweden* (1976) 1 EHRR 617, at [39].

taken by the State concerned in order to secure trade-union freedom” and the refusal to countenance “restrictions that affect the essential elements of trade-union freedom, without which that freedom would become devoid of substance.”⁷⁵ On the basis of a consideration of intervening developments, the Grand Chamber considered the case an opportune moment to revisit its previous jurisprudence, and held that:

“having regard to the developments in labour law, both international and national, and to the practice of Contracting States in such matters, the right to bargain collectively with the employer has, in principle, become one of the essential elements of the “right to form and to join trade unions for the protection of [one's] interests” set forth in Article 11 of the Convention.”⁷⁶

The English courts have considered the question of whether the restrictions imposed by TULRCA on the ability of trade unions to take lawful strike actions are an unjustified interference with this (qualified) right, a question which turns on the proportionality of the interference they undoubtedly constitute: are the procedural requirements at issue, divided into those “aimed at ensuring the democratic validity of industrial action” and those “which require disclosure of information, in particular to the employer” disproportionate by reason of their “complexity, detail and rigidity”?⁷⁷ The Court of Appeal in that case held that neither the requirement to inform the employer of the outcome of the ballot as soon as reasonably practical nor to explain to the employer how figures relating to the employees to be balloted and those to strike were arrived at were disproportionate restrictions with the right and there was therefore no need for them to be ‘read down’ in accordance with s.3 of the Human Rights Act 1998.⁷⁸ A s.4 declaration of incompatibility was not sought. The imposition of complex procedural requirements which must be met if one is to stay on the right side of public power makes unnecessarily difficult the utilisation of the coercive tools the law claims to make available to employees against their employers: as is often the case in the law, they

⁷⁵ (2009) 48 EHRR 54, at [144].

⁷⁶ (2009) 48 EHRR 54, at [154]. Ewing and Hendy suggest that “it is a decision in which human rights have established their superiority over economic irrationalism and ‘competitiveness’ in the battle for the soul of labour law, and in which public law has triumphed over private law and public lawyers over private lawyers.” K.D. Ewing and John Hendy QC, *The Dramatic Implications of Demir and Baykara*, (2010) 39 Industrial Law Journal 2, at 47-8.

⁷⁷ *Metrobus Ltd v Unite the Union* [2009] EWCA Civ 829, at [104].

⁷⁸ At [101]-[113]. In *Serco Ltd v National Union of Rail, Maritime & Transport Workers* [2011] EWCA Civ 226, [2011] I.C.R. 848 these dicta were binding on the court, though Counsel for the RMT left open the possibility of challenging them had the case gone beyond the court of appeal (at [8]).

are used to separate theory from practice, with the latter tilted considerably further towards the interest of employers and employees, as a result, less free than they should be.

6.6.1 The right to strike and forced labour

In law, therefore, the right to freedom of assembly is that human right which most directly grounds the right to strike. It is not, however, the only option. Davis also identifies the possibility of founding the right to strike upon the right to be free from forced labour, the servitude invoked by Laski. Freedom from forced labour is protected under Article 4 of the Convention, which provides that “No one shall be required to perform forced or compulsory labour.” The logic by which this might be extended to imply a right to strike is that “if a country operates a strike ban, then it is in effect forcing workers to do their jobs even when they do not want to.”⁷⁹ Two arguments are identified against this proposition: that workers can still resign their jobs, and that while the right not to work may be justified on the basis of a right to be free from forced labour, it is not clear that the right to return to work at a point of one’s own choosing is similarly justified.⁸⁰ The first exemplifies mistakes of the sort argued against by Hale (who identified coercion where others saw freedom) and made by Pettit in his identification of a property regime with the natural environment. Where a worker who quits would be left with no income he is not meaningfully free to do so, and the property regime which coerces him into not quitting - the fact that if he does so he will be unable to meet his material needs - is neither a pre-legal given *nor* a necessary outcome of the existence of a legal system. It is contingent, and yet where it exists, the absence of a right to strike will for many people indicate that their labour is forced: the theoretical possibility of quitting is precluded by the background distribution of property and the always-impending exercise of public power which sustains it. In the absence of a guaranteed basic income or the radical reform of the modern system of property rights, the right to strike is indeed an important aspect of freedom from forced labour, as it is for republican freedom generally. Its absence will be the proximate cause of unfreedom, and though it is necessarily a poor relation of meaningful property reform, it is far more politically palatable than is such reform.

⁷⁹ Davies, note 41, at 222.

⁸⁰ Davies, note 41, at 222.

6.6.2 The partiality of collective laissez-faire

Since the 1950s, the predominant model of labour law in the United Kingdom has been ‘collective laissez-faire,’ a phrase associated with Otto Kahn-Freund, who drew attention to the relative dearth of legal regulation of labour relations. In their stead, collective laissez-faire was the approach tacitly endorsed by those on both sides of the ‘conflict’. It meant:

“allowing free play to the collective forces of society and [limiting] the intervention of the law to those marginal areas in which the disparity of... the forces of organised labour and of organised management, is so great as to prevent the successful operation of what is so very characteristically called ‘negotiating machinery.’”⁸¹

The British labour movement, unexpectedly heir to a 19th century liberalism as well as to more predictable currents of socialism, Kahn-Freund suggests, demonstrated an “aversion to legislative intervention, its disinclination to rely on legal sanctions, its almost passionate belief in the autonomy of industrial forces,” an attitude which spread to employers, the civil service, and even the courts, such that the political influence of management and labour as organised groupings was vastly more important to their relation with each other than was law.⁸² What law did exist was ‘negative’ in its outlook, designed to remove the impediments to the system of collective laissez-faire which were inherent in a common law system which has not made room for it,⁸³ and without which, the system of bargaining “would have been subject to detailed regulation by the common law, to the point where self-regulation would have appeared to be a wholly one-sided system in the employer’s favour.”⁸⁴

The essence of collective laissez-faire, suggested Keith Ewing in a reappraisal 40 years later is “by definition one of political indifference, in the sense that while the state may remove the

⁸¹ Otto Kahn-Freund, *Labour Law*, in M. Ginsberg (ed), *Law and Opinion in England in the 20th Century*, Stevens (1959), at 224. For a history of the evolution of the concept, see Simon Deakin and Frank Wilkinson, *The Evolution of Collective Laissez-Faire*, (2004) 17 Historical Studies in Industrial Relations 1.

⁸² Kahn-Freund, note, 81, at 224.

⁸³ “collective *laissez-faire* involved not ‘no law’, but a particular type or quality of law, one which put a premium on protecting autonomous collective bargaining and which necessarily, therefore, demanded areas of liberty for trade unionism.” Lord Wedderburn, *Labour Law and Freedom: Further Essays in Labour Law*, Lawrence and Wishart, (1995), at 24, quoted in Deakin and Wilkinson, note 87, at 2.

⁸⁴ Davies and Freedland, note 47, at 12-15.

impediments which prevent trade unions from operating, it is largely indifferent to the success or failure of trade-union organization.”⁸⁵ Ewing accepts the premise of that what legal intervention took place “was limited in scope and scale”⁸⁶ but suggests that in reality the level of intervention was greater than is normally assumed, even if in order to see this “it is necessary to transcend the tendency of lawyers to see social life through the prism of legislation”⁸⁷ and develop an awareness of other forms of state intervention. The sorts of legal intervention Ewing has in mind, however - administrative law alongside the legal regulation of specific industries - do not exhaust the legal mechanisms relevant to the question we have asked here. Two come to mind. Firstly, the law of property which structures the background distribution of wealth and entitlements against which employer and employee negotiate and otherwise interact. Collective laissez-faire cannot be understood except as against that background: once understood, it will be seen that very little is being left alone - the logic of non-interference is *not* at work when the state is at every moment willing to intervene to uphold the distribution of property which fundamentally separates capital from labour; those who need work from those who need not. Secondly, the growing importance of the welfare state, indicative of a growing willingness to redistribute and redirect some of that property, is similarly central to a full picture - it can have the effect of reducing the coercive hold of employer over employee and in turn requiring that fewer reciprocal coercive options be made available to employees in order to rebalance that: if housing, healthcare and sustenance are provided to those out of work, then the threat of losing one’s job, however serious it might be, is not as serious as it would otherwise be. Though specific legislative endeavours were reasonably uncommon, necessitated usually by the need to respond to the more obviously political interventions of the judiciary rather than by a desire to regulate, the law was central to freedom as it waxed and waned: had it not been - had the background of property not been progressively altered and had not the conditions of employment been regulated by statute - it is likely that more specific legal regulation of the right to strike would have been necessary. The use of public force to protect property made (and makes) it inevitable.

⁸⁵ Keith Ewing, *The State and Industrial Relations: 'Collective Laissez-Faire' Revisited*, (1998) 5 Historical Studies in Industrial Relations 1, at 5.

⁸⁶ Ewing, note 85, at 7.

⁸⁷ Ewing, note 85, at 7.

6.7 Free labor in the republican revival

For the most part the neo-republican revival has not yet rediscovered the themes of labor republicanism, and is content to proceed on the basis that the notion of formal equality which triumphed over labor republicanism is acceptable, and perhaps even integral to, the neo-republican project.⁸⁸ Our earlier consideration of money and freedom suggests this is mistaken, and occasionally neo-republican thinkers have signalled the possibility of saying something more radical. So, for example, one particular form of economic domination identified by Pettit as caught within the ambit of non-domination is that which is liable to occur within the employer-employee relationship, in a manner which channels the labor republican movement: “The image of workers as wage slaves casts them as dependent on the grace and mercy of their employer, and as required to court paths of caution and deference in dealing, individually or collectively, with their bosses... it is premised on the appeal... of the idea that workers should not be exposed to the possibility of arbitrary interference, that they should enjoy freedom as non-domination.”⁸⁹ And, as a panacea to domination in the labour relationship, Pettit highlights the necessity of the right to strike: “Let us suppose that individual contracts of employment are wrested from workers under the spectre of destitution, and that they put the employer in a position of domination relative to employees. The resort to collective action, in such a situation, may represent the only hope of winning freedom as non-domination for those who are employed.”⁹⁰ The foregoing account has connected this claim to the existence of a public power which mediates horizontal relations, showing how the state grounds horizontal domination and how its laws can be used to undo such unfreedom.

Pettit has also applied the principle of freedom as non-domination to two specific questions related to an economic context. Firstly, the question of whether non-domination might not justify a guaranteed universal basic income. “The argument is straightforward. Others will control me, if only in the merely invigilatory fashion, only to the extent that the division of powers between us means that they can interfere with me at will - that is, without prevention - and at tolerable cost, i.e. with a degree of impunity. If I am not assured a basic income, there

⁸⁸ For exceptions, see Alex Gourevitch, *Labor and Republican Liberty*, (2011) 18 *Constellations* 431 and, to a lesser degree, White, note 39.

⁸⁹ Philip Pettit, *Republicanism: A Theory of Freedom and Government*, Oxford University Press (1997), at 142.

⁹⁰ Pettit, note 89, at 142.

will be many areas where the wealthier could interfere with me at tolerable cost, without their being confronted by legal prevention of that interference.”⁹¹ We have thus stepped back from a situation in which the dominating party is a specific, identifiable one, to a situation of generalised anonymous domination which is unrelated to a pre-existing legal relationship such as was at issue in the employer-employee example. Instead, the arguably dominated individual is so in relation to a class of people, the domination resulting from the theoretical ability of employers to foist upon the unemployed terms which they accept only because the alternative is to do without food and shelter. From this follows the idea that economic republicanism might number among its demands a universal basic income. A basic income would, so the argument goes, prevent an employee in an overcrowded labour pool from being forced to accept intolerable conditions for fear of starvation by giving him something to fall back on. It becomes a last line of defence against the dominating potential of capital over labour, an alternative to the system-specific coercive weapons on which this chapter and the last have focused.

But the domination against which a basic income provides protection is not limited to such situations of directly economic domination. Take, for example, a woman who is financially dependent upon her husband. Insofar as this is the case, she is dominated by him, forced to live within any limits he might place upon her in the absence of a viable alternative. While the law may provide various protections for this woman, many of which were discussed in a previous chapter, a guaranteed basic income would provide her with the leverage with which to cancel out the domination, as well as, perhaps, the tools with which to resist the need to marry merely to provide financial security.⁹² It is for that reason capable of counteracting at least some of the forms of gendered domination discussed earlier, suggesting that many forms of unfreedom which do not derive directly from economic facts can nevertheless be plausibly framed as resulting from an absence of economic resources and the limited life choices which result from it. It must therefore be noted that notwithstanding that it remains under-theorised, neo-republicanism has acknowledged the existence of - though not the centrality which is afforded to it by the present work - of economic domination as a phenomenon, and has made some tentative steps in the direction of specific policy prescriptions. The content of these

⁹¹ Philip Pettit, *A Republican Right to Basic Income?* (2002) 2 *Basic Income Studies*, at 5. Frank Lovett has similarly argued for an unconditional basic income based on the idea of justice as minimising avoidable domination: Frank Lovett, *Domination and Distributive Justice*, (2009) 71 *The Journal of Politics* 817.

⁹² Pettit, note 89, at 5

policy prescriptions aligns with the argument made earlier regarding the state's role in respect of freedom, which is not solely that assigned to it by liberal thought but instead that of an actor uniquely placed to prevent it. The state may be the great Leviathan, but it possesses a unique capacity to promote freedom. A guaranteed basic income would represent a major leap within our political systems but redistributes within the system, rather than upsetting the system itself and, crucially, provides for a more generalised freedom as non-domination than can system-specific amendments to rights and duties.

6.8 What happens when the state 'retreats'?

The foregoing account of the contribution of property and contract to the understanding of (particularly horizontal) relationships of domination - the manner in which these phenomena determine the conditions under which the coercive apparatus of the state will be put at the service of private actors - permits insight into what happens when the state retreats, and why that retreat cannot be justified by recourse to the language of freedom: neo-liberal and liberal rhetoric about the shrinking state and the increase in freedom which results shows itself to be highly misleading.

When the state actively regulates - when it varies the civil rights and obligations of those who negotiate under its auspices - it should do so principally so as to reduce the imbalance between the parties which stand in a horizontal relationship to each other: to render less likely the possibility that in any given horizontal relationship, one party lives at the mercy of the other. The purpose of the state's intervention should be guided generally by the same principles that Kahn-Freund identified for labour law: "to regulate, to support, and to restrain," so as to rebalance the relationship between the dominating party and the dominated. This is true of legal intervention, the changing of the rules so as to alter the rights and duties of the parties and to place limits on or override the private ordering on which they would fall back if the outcome of the process of mutual coercion against a given background of property was left intact. It is also true, however, of those institutions associated with the modern administrative state. Where social security or other benefits ensure that a worker who is dismissed will not be left destitute - not evicted from his home or left to starve - then his bargaining position with respect to his employer is improved, and the likelihood that he will tolerate the intolerable, accept arbitrary interferences with his interests, on the basis that the

alternative is even worse, is diminished. An abused wife need not live at the mercy of her husband if the state provides her with the resources - material and otherwise - that would permit her to leave when she might otherwise be forced to stay. The administrative state and its close relative, the welfare state, in short, is capable - uniquely so - of promoting horizontal freedom by improving the bargaining position of disadvantaged or otherwise downtrodden actors. When it is unravelled as part of the a neo-liberal programme of reform that speaks the language of freedom (as non-interference) there is a certain irony to the process - a worldview which insists the state is the only entity which meaningfully reduces freedom acts to promote a more widespread, more insidious form of horizontal unfreedom.

What, then, when the state retreats, as it has done and threatens to do further in the last decades? We have invoked, repeatedly, the state of nature as a hypothetical picture of life in the absence of the state and its apparatus. It must be emphasised that the state's supposed retreat, whether due to the learned helplessness of politics in the face of capital, or a neo-liberal/libertarian tendency, does not yet liberate the individual, once and for all, from the possibility of vertical domination and thrust man into this state of pure horizontal domination. Instead, the 'retreating' state leaves behind its coercive apparatus, to continue back up the outcomes of private ordering, though now with far fewer restrictions on the when and where that power will step in: where the state does not actively re-regulate, does not make a conscious attempt to rebalance horizontal relationships, public power is still being put to work to enforce private agreements, which for the reasons we have discussed are inevitably imbalanced. Were we genuinely committed to non-interference by the state, so that not only its specific regulation of particular relationships was abandoned but its entire coercive apparatus was dismantled, three advantages would be discernible:

Firstly, the imbalances in property which condition the outcome of contractual negotiation would disappear. Without some sort of public power to recognise as belonging to this person or to that, there can be no private property: as such, the inequality in bargaining position which renders impossible a truly free bargaining position would not exist. Secondly, the making of agreements would not take place in the shadow of the state: there would be no coercive apparatus to call upon for the enforcement of the outcomes of negotiations - the individual seeking to enforce them would be required to do so personally or through some private arrangement. Thirdly, the absence of the state would entail the absence of a system of

criminal justice and as such the ability of a party to resist the power through whatever means were available to him; not being able to call upon a monopolistic wielder of violence, the enforcing individual potentially runs up against the violence of the contracting party. The 'withdrawal' of the state, then, the supposed (re)opening of a space of freedom for the individual is no such thing: it merely represents a retreat of the state from its central function - that of protecting the individual from the unfreedom of his fellow man - and so ends up encouraging that very same unfreedom. It is no wonder that the property-owning classes are so fond of this partial withdrawal: it leaves them all of the advantages, and none of the disadvantages, of state power. They are protected by the mechanisms of criminal justice (from which privatisation now permits them to profit) against potential domination by those who might otherwise take their property from them without paying, without in turn paying for the welfare institutions and abiding by the regulatory rules which would protect those without property against relationships in which the direction of domination was reversed. A true concern for freedom as non-interference - one which had the courage of its own misplaced convictions - would see the state dismantled and the property rights it enforces (now recognised as simply rules as to the direction and timing of interference) washed away. That it does not - that the property regime and the potential for domination to which it gives rise are hung on to - suggests that what is often framed as a desire for freedom is better understood as a desire to dominate others: to see the have-nots forced to live at the mercy of the haves. What this means is that while a commitment to horizontal freedom does not preclude the recognition of private property, even in the form of productive capital, the recognition of that capital puts in place the conditions for a situation of horizontal domination. Because the coercive options available to each party are determined by law against a background distribution of property whose effect is itself determined by law, the recognition of private property, if it is not to become freedom-reducing, must be accompanied by measures - the redistribution of property or the making available of novel coercive tools to those who would otherwise be the victims of that domination - that redress the imbalance that public power, in recognising property, has created.

Part 3 - Chapter 7: The Failures of Republican Constitutionalism

7.1 Republicanism and constitutional design

Liberal-democratic constitutionalism is remarkable in its convergence on a model in which the similarities far outweigh the differences. Though its makeup varies significantly, as does its relationship with the executive organ, constitutional orders include almost as a matter of necessity a democratic legislature responsible for making rules of general application, sometimes alone, sometimes in conjunction with other bodies to which is recognised authority for a sub-state geographical entity on specified subject matters. This is the aspect of liberal constitutionalism which reflects a belief in, or the assertion of, equality between man and woman, rich and poor, one race or religion and all others. In recognition of the dangers of an unlimited legislative competence, this democratic element is more and more frequently augmented by a set of fundamental legal rights which delineate certain areas of individual (and sometimes group) life which act to frame the law-making power of the democratic organs, sacrificing their right to do whatever they may wish at the altar of freedom. This combination of democracy and rights, where the latter is counterpoint to the former, relegates the pursuit of freedom to a secondary position, behind the more generalised value of equality, and reflects both the inevitability of interference (liberal constitutionalism does not, because it cannot, seek to pursue a generalised non-interference) and the notion that freedom within the constitution is liminal, exceptional, and relates exclusively to the relationship between the individual and the state.

In seeking to replace this with a neo-republican constitutionalism, we are guided by our account of how law - what we have called ordinary law - relates to freedom, offered in part 2. Our break with liberal constitutionalism to that extent derives from the central position accorded to horizontal domination. In our discussion of the state of nature device, we described the human condition in terms of the apparatus man puts in place to protect him from his fellow man, and the threat that apparatus itself poses to his freedom. The constitutional structure of the republican state derives from this diagnosis its central task: how to organise input into public power such that the state neither dominates its citizens *nor* permits them to dominate one another. Freedom is everywhere in the constitution, not merely at its margins as a feature of the relationship between citizen and state; not as something

which becomes relevant exceptionally, at the point at which the state acts beyond right. The questions of republican constitutionalism can be answered *only* following an account, such as that offered in part 2, of the way in which the law structures horizontal freedom and unfreedom.

7.1.1 The failure of non-domination as a constitutional ideal

Non-domination as a constitutional ideal has been largely wasted. It has given rise to a mix of normative theorising which differs minimally from liberal prescriptions and, worse, to alternative theoretical justifications for an unsatisfactory status quo; it has been mapped onto existing debates rather than giving rise to genuinely novel ones, adding fuel to dying fires rather than igniting new ones; overall, it has offered little to live up to the radical heritage of the tradition, nor even to suggest that its resurrection in recent years is a worthy exercise of intellectual labour. This failure will be discussed in the context of debates as to the ideal of non-domination's relationship with both democracy and with constitutional review of legislation, but it is one that might as easily be demonstrated in the context of monarchy, with whose continued existence neo-republicanism is surprisingly content.¹ The neo-republican state looks much like an idealized liberal-democracy. This is neither satisfactory, nor true to its own logic. This failure is not, however, logically distinct from the failure to which we devoted part 2 of this work - that of not taking serious the phenomenon of horizontal domination and the role of public power in permitting and promoting it - but is consequent upon it. Forgotten in the process of designing the republican constitution have been those who live at the mercy not of the state, but of their fellow men.

7.2 Republicanism, democracy and elitism

The ambiguity of the relationship between republicanism and democracy is evident throughout history, particularly in terms of the existence of what have been termed 'elitist' and 'popular' versions of the republican ideal.² Ancient republicanism was elitist in a variety of ways, most obviously in requiring the slavery of some in order that others might be free -

¹ See, for example, Quentin Skinner, *Liberty Before Liberalism*, Cambridge University Press (1997), at 53-4, and Philip Pettit, *Republicanism: A Theory of Freedom and Government*, Oxford University Press (1999), at 20.

² Samuel Dennis Glover, *The Putney Debates: Popular versus Elitist Republicanism*, (1999) 164 Past and Present 47.

the fundamental distinction of republicanism, then, between freeman and slave “was a distinction appropriate to a slave society and to say that this primary distinction characterizes all slave societies is more or less tautological.”³ To start with this distinction, however, is not to accept the inevitability of the existence of slaves; to make it an acceptable basis of a social order, one need only demonstrate that the existence of freemen does not imply or require that of slaves. The republican tradition has always struggled to fulfill this condition, however, even outwith the slave societies in which it arose.

The traditional elitism of republican ideas persisted into their rebirth as an important facet of English and American thought, even where the institution of slavery had not itself survived. As such, “early modern republican thinkers denied that republican states were to be ‘democratic’ in the broad sense of being genuinely popular (where practically every adult male, no matter how poor, would be enfranchised). While they could agree that republicanism meant government by the people, they disagreed over who constituted ‘the people’.”⁴ In this vein, Quentin Skinner collects the pronouncements of various English republicans: Marchamont Nedham refers to the “confused promiscuous body of the people”; Milton calls them “exorbitant and excessive”; Henry Neville suggests that they are “less sober, less considering and less careful” than they would have to be to be trusted with a share in governing power; of pure democracy, Algernon Sidney says simply “I know of no such thing; and if it be in the world, I have nothing to say of it.”⁵ If, then, the republican strand in American historiography is correct,⁶ and the ‘founding fathers’ were more influenced by republican than liberal ideas, it is the elitist current of the former that understood “We the People” in such a way as to tolerate slavery - going so far as to count ‘all other persons’ as three-fifths of a person for the purpose of the apportionment of Representatives in the House and direct taxes: the only way in which agreement between slave and non-slave states could be reached.⁷ Republicanism managed to be both ostensibly democratic in theory and

³ Patricia Springborg, *Liberty Exposed: Quentin Skinner's Hobbes and Republican Liberty*, (2010) 18 *British Journal for the History of Philosophy* 139, at 141.

⁴ Glover, note 2, at 51. See also Graham Maddox, *The Limits of Neo-Roman Liberty*, (2002) 23 *History of Political Thought* 418, at 420.

⁵ All cited in Skinner, note 1, at 31-2.

⁶ For an overview, see Joyce Appleby (ed.), (special issue) *Republicanism in the History and Historiography of the United States* (1985) 37 *American Quarterly*.

⁷ The compromise “if not a covenant with death and an agreement with hell... [was] at least a dramatic instance of [the Revolution’s] conservatism.” Staughton Lynd, *The Compromise of 1787*, (1966) 81 *Political Science Quarterly* 225, at 225. Howard Ohline, suggests the compromise was between two different variants of republicanism: “The major assumption of the first group was that the people were sovereign and

profoundly undemocratic in practice: we have already encountered this as the ‘central paradox’ of American freedom.⁸

Importantly for our purposes, however, is the possibility that this coexistence of a concern for freedom with a willingness to tolerate slavery or to exclude from the ideal large sections of the population was neither contingent nor coincidental. John McCormick suggests that Republican thought in general has “always justified serious constraining or constriction of democracy or *governo largo*; in both the old and new forms of *governo stretto*, the few are granted ascendance over a still politically ‘included’ but subordinated many,”⁹ and this is true of ‘Italian’ republicans of both ancient and modern times, who are not only “antidemocratic and oligarchically inclined,” but can also “be situated in close proximity to subversions or usurpations of popular governments.”¹⁰ Seen in this light, the consistently undemocratic nature of republican thought might be seen as central to it - perhaps where any other aspect is highlighted, we are in fact disrespecting the tradition, and the republican tradition is to that extent betrayed by attempts to reconceptualise it as a democratic constitutional ideal. The slavery/freedom paradox was, on this view, hardly paradoxical at all. Graham Maddox reaches a similar conclusion, suggesting that republicanism’s democratic content was wholly contingent, for the very notion of the *res publica* was intended to provide post-monarchical states with a “new legitimacy” which would replace that of the king but was mere rhetoric:

“it all depended on how the power of public authority was to be channelled. It was quite possible... for an elitist ruling group to exclude large sections of the population from an effective share of power. It was only those who were not excluded who could hope to enjoy the fruits of non-domination.”¹¹

constitutional control of representation should limit legislative power, while the assumption of the latter was that the legislature was sovereign and its control of representation would protect private property from popular whim.” As such, “the new nation had to acknowledge the existence of slavery in its legislature in order to be republican... the major dispute in the Convention was not whether this should or should not be, but *how* it would be done.” Howard A. Ohline *Republicanism and Slavery: Origins of the Three-Fifths Clause in the United States* (1971) 28 *The William and Mary Quarterly* 563, at 568 and 584.

⁸ Edmund S. Morgan, *Slavery and Freedom: The American Paradox*, (1972) 59 *The Journal of American History* 5.

⁹ John P. McCormick, *Machiavellian Democracy*, Cambridge University Press (2011), at 142.

¹⁰ McCormick, note 9, at 143.

¹¹ Maddox, note 4, at 420.

In making the link between inclusion and non-domination, Maddox demonstrates that, conversely, exclusion implies domination. We see that a democracy that is not all-encompassing can be justified only if it can be shown that not all deserve to be free.

7.2.1 Justifying republican elitism

Republican elitism was generally justified on economic grounds, by reference to the impossibility of those who were not their own masters contributing responsibly to the political community, or to the likelihood that, given an equal share of political power, they would have an incentive to abolish property: “It was generally held in early modern times that ‘the people’ were the ‘virtuous’ - men of independent means who were not beholden to the influence of other men. In short, the virtuous were property-holders or masters of households or businesses.”¹² This interpretation was common to many of the English republicans: “James Harrington, Milton and even Nedham all proposed models of government which excluded the common people from meaningful participation.”¹³ When the Parliamentary forces debated the constitutional settlement which they hoped to impose upon Charles I at St Mary’s Church in Putney, this aristocratic element was represented by the Grandees, who argued for a restricted franchise (“no man hath a right to an interest or share in the disposing of the affairs of the kingdom... that hath not a permanent fixed interest in this kingdom”)¹⁴ as a rejoinder to Rainborough’s claim that “the poorest hee that is in England hath a life to live, as the greatest hee... the poorest man in England is not at all bound in a strict sense to that Government that he hath not had a voice to put Himself under.”¹⁵ We earlier considered the phenomenon of labor republicanism and its insistence that wage labour (or ‘wage slavery’) was an evil in that it exposed the worker to the dominating potential of his employer, stunting his development as a citizen and rendering him unsuited to a stake in the republic. This republican elitism is the corollary of that idea in constitutional terms: where the labor republicans sought to dismantle the system of wage labor, constitutional thinkers, starting from the same premise, reaffirmed the necessary exclusiveness of the franchise. If the system of property is such that a majority of the population is unsuited to political participation, the solution is to maintain

¹² Glover, note 2, at 51-2.

¹³ Glover, note 2, at 52. Also de Sismondi - see Nadia Urbinati, *Sismondi de Sismondi’s Aristocratic Republicanism*, *European Journal of Political Theory* (forthcoming, 2013).

¹⁴ Henry Ireton, in *The Putney Debates*, in Andrew Sharp (Ed.), *The English Levellers*, Cambridge University Press (1998), at 103.

¹⁵ Thomas Rainborough, in *The Putney Debates*, note 14, at 103.

an elitism which, conveniently, prevented that reform of the property system from ever taking place. Not having property, the masses were excluded from the political process which might have permitted them to access it.

The question of whether it is desirable to permit popular access to the levers of government is an echo of earlier republican themes. Machiavelli asks whether the “guardianship of liberty” is best entrusted to the common people (as by Rome) or the nobility (as by Sparta and, in his day, Venice).¹⁶ As a question of reason, both aristocracy and democracy have certain merits. The former sates the ambition of the elites by giving them a greater role to play in the exercise of power, and excludes from such power “the restless minds of the plebeians that is the cause of countless conflicts and disagreements in any republic...”¹⁷ The latter reflects that the common people maintain only “the desire not to be dominated” unlike the “desire to dominate” of their noble compatriots; their “stronger will to live in liberty” makes it “reasonable to think that they will take better care of it, and, being incapable of appropriating it for themselves, they will not permit others to do so.”¹⁸ Having thus hedged his bets, Machiavelli slips into his realist guise and notes that the duration of liberty in Sparta and Venice as compared to Rome suggests that the nobility is the better choice,¹⁹ stating openly the pragmatic consideration that remained central to the resistance of the expansion of the franchise, right up to the point at which it finally took place.

7.2.2 Intrinsic and instrumental justifications of democracy

Where republican political theory has indicated a democratic bent, it has done so hesitantly and inconsistently. David Held draws a distinction between developmental and protective republicanism: “In the broadest sense, developmental theorists stress the *intrinsic* value of political participation for the development of citizens as human beings, while protective theorists stress its *instrumental* importance for the protection of citizen’s aims and objectives.”²⁰ This distinction is an important one, but the former also has an instrumental

¹⁶ Niccolò Machiavelli, *Discourses on Livy*, (Trans. Julia Conaway Bondanella and Peter Bondanella), Oxford University Press (2008), at 31-33.

¹⁷ Machiavelli, note 16, at 32.

¹⁸ Machiavelli, note 16, at 31.

¹⁹ Machiavelli, note 16, at 33.

²⁰ David Held, *Models of Democracy* (2nd ed.), Stanford University Press (1997), at 44. Held notes the ‘profound and striking’ articulation of developmental republicanism in the work of Marsilius of Padua, but that

dimension that Held's classification threatens to obscure - it is equally possible to insist upon participation *as a good in itself*, notwithstanding the kind of good that we could and should continue to insist upon even if our every instinct about its effect was demonstrated to be false. It is this latter sense in which the distinction Held identifies exists within the contemporary literature; inherent versus instrumental goods rather than goods which develop individuals as citizens versus those which protect or assist in the achievements of their aims.

Instrumental logic takes on a different meaning here than in relation to those other goods historically associated with 'the republic.' Many of these were well-suited to such logic in that the relevant goods were intangibles which might be 'fostered'; which might increase or diminish over time, depending on whether the polity functioned as intended. What these intangibles have in common is that their achievement is not immediate - one does not institute a system of governance and immediately find that one has created a virtuous community; instead the virtue develops over time. Against this, the achievement of non-domination is an immediate good, so that the causal relationship between the constitution and non-domination lacks the temporal dimension that is an aspect of civic republicanism. A constitutional system is either constitutive of republican freedom - in that it prevents arbitrary interference by the state with the interests of its citizens - or it is not. If it is not, then it cannot be said to promote, encourage or foster such freedom. If it is, then it fulfils this role by definition, and not contingently; immediately, and not through the passage of time. On the other hand, the second end we have identified for the republican constitution - providing a system of private law and obligations which protects and promotes the freedom of those who were previously or would otherwise be, horizontally unfree - returns to the picture the question of time. The contributions of the republican constitution to the two forms of freedom therefore diverge in their temporal dimension. Vertical domination is undone by a constitutional order which either excludes the arbitrary exercise of public power or does not. Its horizontal counterpart, however, is constituted by an already-existing system of private rules which themselves regulate against the background of an established distribution of property and other rights. This creates an inertia which attempts to undo horizontal domination must overcome, and whose overcoming will take time. We thus connect republican constitutionalism back to part 2's account of law and horizontal domination. The

its 'most elaborate statement' is found in Rousseau; protective republicanism is associated with Machiavelli, Montesquieu and Madison. (at 45).

exclusion of some from the franchise on the basis of gender which renders vertically unfree, and of others on the basis of property holdings which condemns the poor to live at the mercy of public power, also founds the possibility of horizontal domination of those who are excluded by those who participate. The various legal reforms which we have surveyed and which have had the effect of promoting horizontal domination - the reform of divorce law, the occasional intervention in support of workers' rights and, framing it all, the minimal redistribution of property via the welfare state - must be understood as in part the consequence of the same changes. The achievement of human freedom has been and continues to be likely to be secured only as a result of the prior achievement of political freedom.

7.3 Neo-republicanism and democracy

Neo-republicanism insists upon its democratic credentials. No variant fails to make room for the democratic ideal, and the difficulty associated with the non-interference ideal (that, containing no democratic imperative, it does not itself ground an insistence upon the mechanisms of liberal democracy with which it is normally associated) is avoided. More important is the question of how the democratic imperative is justified: what is its relationship with non-domination and on which side of the intrinsic/instrumental split does it fall? Viroli reminds us explicitly that the classical republicanism on which he draws is "not a theory of democracy" but instead "a theory of political liberty" which "considers citizens' participation in sovereign deliberation necessary only when it remains within well-defined boundaries."²¹ Agreeing with this assessment would mean that the exact point at which those boundaries are situated decides for us the question of whether the theory of political liberty demands a constitutional order that is minimally democratic and therefore unacceptable to modern sensibilities; mildly democratic and therefore not usefully distinct from the modern western status quo; or radically democratic, such that in form or content, neo-republican democracy provides something that neither its forebears nor its liberal counterparts can offer. Viroli's focus upon 'political' liberty restrains him, however, within the state-citizen paradigm such that the participation upon which he considers republicanism to insist is not calculated to fulfil the role our analysis in part 2 has identified for democracy, of facilitating

²¹ Maurizio Viroli, *Republicanism*, Henry Holt & Company (2003), at 8.

horizontal as well as vertical freedom, in recognition of neo-republicanism's status as a theory of human, as well as political, liberty.

Skinner, on the other hand, brings democracy to the centre of his republicanism, via the linkage between free men and free states. It will be remembered that Skinner defines a free state as one in which all citizens have a role in the formulation of the laws: "if a state or commonwealth is to count as free, the laws that govern must be enacted with the consent of all its citizens, the members of the body politic as a whole"²² and "the government of a free state should ideally be such as to enable each individual citizen to exercise an equal right of participation in the making of laws."²³ By then associating human freedom with life in a free state, Skinner's republicanism makes some form of democracy a prerequisite of republican government. Where there is no democracy, the state is unfree; where the state is unfree, so are its citizens. There is no possibility for the separation of human freedom from the right of democratic participation. Democracy is not a good worth insisting upon alongside freedom, nor the one true path to freedom; democracy constitutes freedom. It does so, however, by requiring the consent of citizens: not on the basis of any particular substance of the laws which will thereby result; not because democracy, as political freedom, encourages the enactment of law which promotes human freedom. The form of democracy Skinner identifies in his theory of free states is therefore overly formalistic: it may constitute a situation of vertical non-domination but we learn nothing about any contribution it might make to the ideal of horizontal non-domination.

Against this, Pettit sides with Viroli in arguing that republicanism is not a theory of democracy, the value of which he recognizes instrumentally: "Democratic participation may be essential to the republic, but that it is because it is necessary for promoting the enjoyment of freedom as non-domination, not because of its independent attractions: not because freedom, as a positive conception would suggest, is nothing more or less than the right of democratic participation."²⁴ This is an unhelpful framing of the issue, inasmuch as it ignores the possibility of a positive conception in which democracy is a necessary but not sufficient condition for the constitution of freedom. But what kind of democracy is envisaged? Accepting that "any system of law leaves decision-making power in the hands of various

²² Skinner, note 1, at 27.

²³ Skinner, note 1, at 30.

²⁴ Pettit, note 1, at 8.

public authorities,” Pettit demands that the “decisions in question should be made on a basis that rules out arbitrary power.” Power will be exercised arbitrarily wherever “the decisions they make can be based on their private, perhaps sectional, interests or on their private, perhaps sectional ideas as to what their brief - their brief qua legislator, administrator or judge - requires.”²⁵ The aim becomes that, not of designing a system where certain individuals do not have the power to act according to such interests, but a counter-factual one of ensuring that decisions made on the basis of the wrong type of interest can be challenged - ongoing contestability providing a legitimation that cannot be achieved by the consent which Skinner’s reconstruction of the free state requires (which will in the case of some decisions be manifested only in a “vanishingly weak” sense) or historical justification:

“The non-arbitrariness of public decisions comes of their meeting... the condition of being such that if they conflict with the perceived ideas of the citizens, then the citizens can effectively contest them.”²⁶

The requirement that decisions be made through “deliberation that includes all the major voices of difference within the community,”²⁷ and is open to ongoing contestation, lends to the process a Darwinian quality: “democracy provides an environment for the selection of laws which ensure that survivors are generally satisfactory... they may be presumed to answer to the interests and the ideas of people at large.” In keeping with the themes of the first republican revival, Pettit’s contestatory democracy is explicitly counterpoised to the interest group pluralism (wherein citizens are understood as self-interested maximisers of value and the state’s officials as providers of that value, so as to achieve the maximum possible satisfaction of aggregated preferences) which stimulated the work of thinkers such as Sunstein, for “to make naked preference into the motor of social life is to expose all weakly placed individuals to the naked preferences of the stronger.”²⁸ Instead, the republican ideal puts reason, rather than bare preference, “requiring public decision-makers to make their decisions, and to make them transparently, on the basis of certain neutral considerations.”²⁹

²⁵ Pettit, note 1, at 183-4.

²⁶ Pettit, note 1, at 185.

²⁷ Pettit, note 1, at 200.

²⁸ Pettit, note 1, at 205.

²⁹ Pettit, note 1, at 203. This phrasing recalls the so-called process school of American jurisprudence, and in particular the attempt by Herbert Wechsler to blunt the judicial trespass onto the terrain of democratic politics via a requirement that judges make their decisions on the basis of ‘neutral principles’: reasons that in their

Pettit's prescriptions remain at this level of abstraction, and even then it is not clear that contestatory democracy will do the work he wants it to: McCormick notes many republicans who shared Pettit's normative basis "specifically criticized as instruments of their own domination institutions very similar to the ones Pettit endorses as guarantees against this domination."³⁰ In trying times to avoid 'populism', Pettit demands too little and consequently aligns himself with "aristocratic philosopher-statesmen [and] the *literati* who rather dutifully served the former's interest."³¹ The claim is that neo-republicanism, far from having moved beyond the elitism of traditional republicanism has in fact failed to learn its lessons and so ended up repeating its mistakes. Pettit stops short of bare populism, but only at the cost of reasserting aristocratic rule.

Bellamy returns to our earlier point about the superiority of republican to liberal freedom in terms of ability to justify a democratic imperative. The latter struggles to explain why people must sacrifice private freedom for political participation, and so accepts the possibility of non-democratic governance, if that is the form which best guarantees the general freedom, and specific liberties, which liberal freedom prizes. The republican ideal of freedom as non-domination, on the other hand, cannot accept inequality between ruler and ruled: such a situation will render the ruled unfree in that it exposes them to arbitrary will of their rulers. It requires a form of collective decision-making, for "only under some such system of collective self-rule will their interests and opinions be treated with equal concern and respect in ways which are non-dominating."³² Faced with a choice between demanding such equal concern and respect in outcome or in procedure, Bellamy suggests that democracy is justified on a procedural basis that it is the only plausible candidate for "an equitable process for deciding between individuals' often competing claims,"³³ and not "because it necessarily produces decisions that all consider substantively equitable."³⁴ Agreeable outcomes are not guaranteed, nor should they be, for defining the standard by which these outcomes are judged and making inter-personal comparisons is impossible.

generality and their neutrality transcend any immediate result that is involved." Herbert Wechsler, *Towards Neutral Principles of Constitutional Law*, (1959) 73 Harvard Law Review 1, at 19.

³⁰ McCormick, note 9, at 165.

³¹ McCormick, note 9, at 165.

³² Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy*, Cambridge University Press (2007), at 211-2.

³³ Bellamy, note 32, at 212.

³⁴ Bellamy, note 32, at 213.

7.3.1 A republican failure?

The extent to which neo-republican thinkers exert themselves to define democracy and establish the true nature of its relationship with neo-republicanism becomes disappointing when it is recognised that the democracy in question is largely indistinguishable from standard liberal-democratic constitutionalism. The republican theorist is not demanding a republican constitution, but establishing that it can be unproblematically reconciled with the status quo, and quibbling as to exactly why this is so; neo-republicanism fits its theoretical framework to existing arrangements rather than providing an ideal to which the real-world must be adapted.

If republican democracy seeks to go beyond democracy as we currently experience it, what might it look like? The place from which to begin is the account offered in part 2 of this thesis, which suggests that for an individual to be free, it is not sufficient to be free in relation to the state - as most neo-republican scholarship seems to suggest - but that to this political freedom must be added a human freedom: the relationship between man and man, between man and woman, between man and all those to whom he stands in a horizontal relationship, must also be free. Public power, as directed by law, must never ground the ability of one to interfere arbitrarily with the interests of another. This demand makes two contributions to our account of the relationship between freedom and democracy. Firstly, it permits us to explain in neo-republican terms, the growth of freedom in modern societies on the basis of its relation to democracy. When the franchise has been extended, there has been, in succession, an alteration of the two features of a political-legal system which were in part 2 identified as being instrumental to the process of freeing historically dominated groups - the amending of the private rights and obligations of, say, wives in relation to husbands, or employees to employers, and the redistribution of property via a system of welfare provision which lessens the possibility of those categories of person (but also others) having to live at the mercy of others. Those who were historically dominated by the state by reason of their exclusion from the franchise were also dominated horizontally by those whose access to legislative and executive power allowed them to ossify a body of private law which had the effect of condemning others to live at their mercy. Secondly, the insertion of this additional normative ideal into the process of considering the nature of the republic's constitution - aimed now at human rather than merely political freedom - provides a standard that is not only higher

(freedom as an all-pervasive legal project rather than one that is embodied solely by mechanisms of rights protection), but better focused. We now consider democracy in light of the knowledge that it is endorsed for its ability also to promote horizontal freedom. Its strengths and its failings are to be judged in that light.

7.3.2 Conclusion

It was noted in the context of the neo-liberal challenge to the legitimacy state intervention that to enter into the debate is to lose it: where one is forced to start by justifying the very existence of the state, ground is conceded, and the difficulty of arguing for the extent of intervention one might wish to see increases exponentially. A similar point might be made in the context of the neo-republican promotion of democracy. Previously noted for its ambivalence towards (if not outright hostility to) the democratic ideal, republican scholarship has dwelt upon the fact that it has shed this skin and now embraces democracy as either constitutive of, or instrumental to, the achievement of the non-domination ideal. This defensive poise is inimical to an attempt to transcend the limitations of our prevailing modes of constitutional organization. The failure to recognise the constitutional order - public law generally - as the midwife of the body of private law rules which is determinative of coercive options and so, the horizontal freedom of individuals, leads to a certain complacency with regards to the democratic process: it is assumed that where there is a general input into the choice of representative the vertical relationship is, at least in rough terms, one of freedom but there is little concern for how that connection might be distorted or what the consequence (in terms of horizontal freedom) of such distortion would be. This theme will be taken up in our final chapter.

7.4 Republicanism and rights review of legislation

It remains to consider neo-republicanism's position with regard to the other central plank of modern liberal-democratic constitutions, the use of fundamental rights norms to limit the legitimate output of the democratic organ and protect freedom. Taking a moment here to define our terms is important - the literature on this point variously claims to be discussing

‘rights review’,³⁵ ‘judicial review’³⁶ and ‘constitutional review’³⁷ and it is not always obvious that the same phenomenon is at issue in each case. Judicial review refers, usually, to the legal oversight of the exercise of executive power; constitutional review differs in that it relates not to ordinary law and the power exercised under it, but instead to the relationship between legislative and executive action on one hand and some form of ‘higher’ or ‘fundamental’ law, usually that of a constitution, on the other. Nevertheless, the label ‘judicial review’ is capable of referring to a broader phenomenon, which would seem to include constitutional review alongside ordinary review of legislative and executive action, and insofar as the question for judges is the extent to which actions or laws fall within the grant of power made via the constitution (on one hand) or legislation (on the other), the form of decision making is similar. That the fundamental constitutional provisions in question will often relate to rights accounts for the overlap between this and rights review, but rights review, concerning fundamental rights rather than ordinary of legality, gives the judicial task a different nature. The phenomenon discussed here, ‘rights review of legislation’, is a subset of the overlap of these categories - like constitutional review, it relates to compatibility with higher-order provisions such as a constitution, and like rights-review, it concerns rights, but where rights review would normally refer to both legislative and executive action, the form of review that merits most attention and which proves most controversial is limited to that of legislation.³⁸ Some brief reasons can be provided in justification of this restriction. The first is that the executive, though it may be formed out of and overlap with the legislature, is not always directly elected (where it is, the elected element is likely to be partial, as in the United States). Given that most legal powers of the executive will derive from acts of the legislature, their review by the courts can be justified to a considerable degree upon democratic grounds - holding the

³⁵ E.g., Janet Heibert, *Interpreting a Bill of Rights: The Importance of Legislative Rights Review*, (2005) 35 *British Journal of Political Science* 235.

³⁶ E.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, (2006) 115 *Yale Law Journal* 1346.

³⁷ E.g., Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act*, Cambridge University Press (2009). Kavanagh uses ‘constitutional review’ to refer to “the courts’ powers to review primary legislation under the [Human Rights Act],” distinguishing them from “their traditional powers of ‘judicial review’ with respect to public authority decision-making in administrative law.” Such designation is held justified by its ability to highlight “the constitutional character of the courts’ supervisory powers, and indeed, the constitutional character of the HRA itself” (at 5).

³⁸ This distinction is noted in law in, for example, the United Kingdom’s Human Rights Act, s.6 of which prohibits ‘public authorities’ from acting incompatibly with convention rights, but which is subject to the defence that primary legislation required them to act in that way (s.6 (2)). This distinguishes executive action which is unlawful because incompatible with convention rights from that which is incompatible with convention rights but nonetheless lawful because mandated by Parliament.

executive to the limits imposed on it by the representative organ³⁹ - while review of that legislation itself is, by design, an anti-democratic (or anti-majoritarian, if that is not the same thing) procedure. If an executive action taken in pursuance of a power delegated to it by the legislature breaches rights without falling foul of ordinary principles of judicial review, the fault lies with the legislature rather than the executive.

7.4.1 Rights review in liberal democracy

Discussion of republicanism and rights review of legislation takes place against the background of debates regarding the latter's compatibility with democracy generally, a debate often characterized as that between legal and political constitutionalism.⁴⁰ Where legal constitutionalism requires, amongst other things, strong judicial review, political constitutionalism would seem to demand either that fundamental legal rights play no part in these processes (being merely "the statement of a political conflict pretending to be a resolution of it")⁴¹ or, that their involvement is limited to underpinning weak review, with the role of the legislative branch augmented rather than usurped and its supremacy left intact. Such debate goes back at least as far as the 1970s, and the push for the incorporation of the European Convention on Human Rights into domestic law, a course of action held incompatible with the then-dominant 'political constitution.'⁴² Though incorporation has been widely welcomed, including by notable former opponents,⁴³ political constitutionalism has

³⁹ This argument places the ultra vires doctrine at the centre of judicial review. For a defence of the position, see Christopher Forsyth, *Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review*, [1996] Cambridge Law Journal 122. For opposing views, see Dawn Oliver, *Is the Ultra Vires Rule the Basis of Judicial Review?*, in Christopher Forsyth (Ed.) *Judicial Review and the Constitution*, Hart Publishing (2000), and Paul Craig, *Ultra Vires and the Foundations of Judicial Review*, [1998] Cambridge Law Journal 63.

⁴⁰ The main works include on one side, Jeremy Waldron, *A Right-Based Critique of Constitutional Rights*, (1993) 13 Oxford Journal of Legal Studies 18; Jeremy Waldron, above, note 50; Mark Tushnet, *Taking the Constitution Away from the Courts*, Princeton University Press (1999); Adam Tomkins, *In Defence of the Political Constitution* (2002) 22 Oxford Journal of Legal Studies 157; Adam Tomkins, *Our Republican Constitution*, Hart (2005); J.A.G. Griffith, *The Political Constitution*, (1979) 42 Modern Law Review 1. On the other, key works include Lord Hewart, *The New Despotism*, Ernest Benn (1929); Lord Hailsham, *The Dilemma of Democracy: Diagnosis & Prescription*, Collins (1978), Ronald Dworkin, *Taking Rights Seriously*, Harvard University Press (1977), T.R.S. Allan, *Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism*, Oxford University Press (1993); John Laws, *Law and Democracy*, [1995] Public Law 72

⁴¹ Griffith, note 40, at 14.

⁴² Griffith, note 40, at 14.

⁴³ Conor Gearty, *The Human Rights Act: An Academic Sceptic Changes His Mind But Not His Heart*, (2010) 6 European Human Rights Law Review 582. A notable exception is Keith Ewing - see his *The Futility of the Human Rights Act* [2004] Public Law 829 and, with Joo-Cheong Tham, *The Continuing Futility of the Human Rights Act* [2008] Public Law 668.

survived it. It remains a vibrant position, though increasingly prompted to self-reflection rather than external critique.⁴⁴

An intermediate position identifies three Anglophone jurisdictions - Canada, New Zealand and the United Kingdom - in which the form of rights-review available is 'weak' (the courts possess no power to strike down legislation) and suggests that they together constitute a 'New Commonwealth Model' of constitutionalism which "self-consciously departs from the American model by seeking to reconcile and balance the rival claims [to legislative and constitutional supremacy], to create a middle ground between them rather than adopt a wholesale transfer from one to the other."⁴⁵ On this reading, the success of the Human Rights Act in reconciling rights protection with Parliamentary sovereignty can be attributed in part to the availability of other examples upon which to draw. A second, related, manner of viewing the issue emphasises the extent to which constitutional settlements such as that in the Human Rights Act 1998 prompt legal and political institutions to enter into a dialogue.⁴⁶ Here the point is not which form of institution should win out, but that a successful legal challenge requires a political organ to reflect upon or re-justify its decision to interfere with rights.

7.4.2 Rights review - principle and pragmatism

Amongst arguments against political constitutionalism advanced within mainstream constitutional thought, we might distinguish between the principled and the consequentialist. J.A.G. Griffith, who supplied the keystone of political constitutionalism, also contributed greatly to consequentialist understandings of the position in an indirect fashion through his work on the political attitudes of the judiciary.⁴⁷ Allied to a judicial record which did not suggest a propensity to vindicate the freedom(s) which give purpose to constitutional

⁴⁴ E.g., Graham Gee and Grégoire Webber, *What is a Political Constitution?*, (2010) 30 Oxford Journal of Legal Studies 273.

⁴⁵ Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, (2001) The American Journal of Comparative Law 707, at 709; Stephen Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism*, (2010) 8 International Journal of Constitutional Law 167, and Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism: Theory and Practice*, Cambridge University Press (forthcoming). See also Janet Hiebert, *Parliamentary Bills of Rights: An Alternative Model?*, (2006) 69 Modern Law Review 7, considering the cited jurisdictions as well as the Australian Capital Territory.

⁴⁶ On which see, originally, Peter Hogg and Allison Bushell, *The Charter Dialogue Between Courts and Legislatures (Or Perhaps the Charter of Rights Isn't Such A Bad Thing After All)* (1997) 35 Osgoode Hall Law Journal 75, and, for a recent survey, Yap Po Jen, *Defending Dialogue*, [2011] Public Law 527.

⁴⁷ J.A.G. Griffith, *The Politics of the Judiciary* (5th ed.), Fontana Press (1997) and *Judicial Politics Since 1920*, Blackwell (1993).

review,⁴⁸ this scholarship had the effect of demonstrating why political constitutionalism was likely to produce ‘better’ outcomes than its legal rival. Not only was it the case that where freedom had been expanded, empirical evaluation suggested that it was the political rather than the legal branches which deserved credit, it was the case that very often attempts by those same political institutions to expand liberty had been thwarted by the courts for spurious reasons. The idea that the judiciary could be guardians of liberty was not only false, but doubly so when the claim took the form of a contrast between judicial and political actors. And yet such claims were often made: political institutions were claimed to be inherently prone to short term thinking and open to the sort of populist rabble-rousing and crude political calculations that ended with the rights of unpopular minorities being sacrificed at the altar of the ‘public good’. Only judges could be trusted to protect them, to improve outcomes on the axis of non-interference in the name of a rule of law ideal which was acquiring a thick substantive element, something far beyond Dicey’s mix and match of formalism and substantivism, requiring a body of fundamental rights law with priority over the outcome of the political process.

Where such consequentialist thinking was apparent, the good which each ‘side’ sought was the same: this was not a dispute as to ends, but how to achieve them. The principle of the issue is more subtle. One of the most basic reasons for taking a political constitutionalist position would be a general scepticism towards the idea of human rights. Such scepticism takes many forms, several of which will automatically rule out of bounds the notion that such rights can and should be protected through law.⁴⁹ However, support for the protection of rights in law does not have as a prerequisite a belief in moral rights, and so rights-scepticism requires some extension before it constitutes a meaningful argument against rights review. One of the most prominent sceptics of legal- (or rights-) constitutionalism founds his

⁴⁸ The list one provides to illustrate this point will vary according to the area of law one holds to be most important. Famous examples include *R v Halliday, ex parte Zadig* [1917] AC 260, *Liversidge v Anderson* [1942] AC 206, both relating to detention in wartime; *R v Secretary of State for Home Affairs, ex parte Hosenball* [1977] 1 WLR 766 and *R v Secretary of State for the Home Department, ex parte Cheblak* [1991] 1 WLR 890, relating to deportation of foreign nationals (all four feature in ‘episode 1’ of the standard narrative contested by Adam Tomkins in his *National Security, Counter-Terrorism and the Intensity of Review - A Changed Landscape?* (2010) 126 Law Quarterly Review 543). Not all examples relate to national security: a previous chapter considered *Rookes v Barnard* [1964] AC 1129, a case, like many of the objects of Griffith’s ire, which had the effect of limiting the right to strike.

⁴⁹ Three of the most important are collected in Jeremy Waldron (ed.), *‘Nonsense Upon Stilts’: Bentham, Burke and Marx on the Rights of Man*, Taylor & Francis (1987).

argument (at least in part) on rights.⁵⁰ One need not reject the protection of fundamental rights through law merely because one does not credit them with a natural, pre-legal existence. Conversely, a belief in their existence does not logically necessitate their protection in law. The existence or non-existence of such rights does not provide a principled argument for either a legal or political constitutionalism. Most of the latter such arguments are built instead upon democracy, in two senses. Firstly, to the extent that democracy roughly equates to majority rule, a counter-majoritarian system, which places certain acts outwith the legitimate sphere of action of a legislative majority, is by definition incompatible with it. Strong review takes power from the people and gives it to the court; it removes decision-making on fundamental issues from the hands of the people or their elected representatives and gives it instead to a small judicial elite who are unlikely to be representative⁵¹ and, even if they are not, are not usefully accountable.⁵² This work has endorsed ‘ordinary’ judicial review, but here the issues to be adjudicated upon are controversial precisely because of the manner in which they differ from ordinary questions of legality. This is relevant also to the second invocation of the principle of democracy, which counsels political decision-making over legal-decision making on the basis of its procedural superiority. Where courts will usually employ an adversarial system in which claims are advanced in an absolute fashion and either accepted or rejected by the judge, political procedures allow greater scope for multiple interlocutors; differing and contrasting forms of reasoning; consensus and compromise etc., and thus seem better adapted to making decisions complicated by what have been called ‘the circumstances of politics’⁵³ or the allocation of scarce resources, or the reconciliation of multiple incompatible conceptions of the good. Rights review has a tendency to distort the rhetoric of civil discourse, prompting both a legalization of politics, as parties seek to win in court battles that they have lost at the ballot box, and a corresponding politicization of law, as judges are forced rule on political debates on which they have no

⁵⁰ Waldron, note 40.

⁵¹ For recent consideration of issues in this context in the United Kingdom, see, Ministry of Justice, *Appointments and Diversity: A Judiciary for the 21st Century* (CP19/2011, 2011) and the report of the House of Lords Select Committee on the Constitution, *Judicial Appointments*, (2010-12, HL 272), chapter 3. The resulting Crime and Courts Bill proposes minor alterations, intended to promote diversity, to the system of judicial appointments.

⁵² Which is not, of course, to say, that judges *should* be any more ‘accountable’ than they already are.

⁵³ That is, the “felt need among the members of a certain group for a common framework or decision or course of action on some matter, even in the face of disagreement about what that framework, decision or action should be...” Jeremy Waldron, *Law and Disagreement*, Oxford University Press (1999), at 102.

expertise, potentially leading to demands that they submit to some form of political accountability.⁵⁴

7.5 Political constitutionalism

Political constitutionalism, therefore, is normatively justifiable on either principled grounds - institutional factors which can be diluted but never overcome, and philosophical considerations, relating to the status of rights - or pragmatic grounds, the latter available particularly to those who shared with J.A.G. Griffith the sort of political views which seemed entirely at odds with the judicial record. A strong normative political constitutionalism is likely to include both elements. Their exact balance is liable to be made clear by any alteration in the factual matrix which underpin its consequentialist aspect. Such alteration is exemplified by what is widely considered to be an improved, if still patchy, judicial record in recent years, and so the question becomes: do such improvements weaken, or even precipitate the abandonment of, a normative commitment to political constitutionalism?⁵⁵

If so, if a belief that judges have, perhaps by reason of a widening access to the bench particularly and the legal profession more generally, or perhaps because the Human Rights Act has caused them to shed some of their illiberal tendencies, allows us to reconcile ourselves with their increased prominence within the constitution and newfound status as guardians of liberty, then it is perhaps the case that our normative commitments are not as strong as they once seemed. If a courtroom is an inferior site of decision-making than a legislative chamber by reason of its adversarial system and deafness to non-legal rationalities, then it is so whether the judges are making decisions which please or decisions which appal us. Similarly, those who believed that statements of rights are merely political claims in an unconvincing metaphysical garb, which have a tendency to degrade the discourse into which they are introduced, should be able to acknowledge that this remains true even when these rights have been written into law and instrumentalised in a (mostly) pleasing fashion.

⁵⁴ This is a key theme of Jonathan Sumption's F.A. Mann lecture, *Judicial And Political Decision-Making: The Uncertain Boundary*, delivered 8th November 2011, which adds up to a call for the English judiciary to develop a "a coherent or principled basis for distinguishing between those questions which are properly a matter for decision by politicians answerable to Parliament and the electorate, and those which are properly for decision by the courts."

⁵⁵ The high point of this improved judicial record, if this is what it is, is presumably the decision of the House of Lords in *A and others v Secretary of State for the Home Department* [2004] UKHL 56, holding that part IV of the Anti-terrorism, Crime and Security Act 2001 was incompatible with the Convention on Human Rights.

Alterations in the factual background may also explain the increasing deployment of rhetoric once suited to the political left by those on the right. So, for instance, the ‘third-way’ pursued by New Labour, represented most obviously by the abandonment of Clause IV of its constitution, lessened the extent to which conservative forces were reliant upon the judiciary to act as a block to any potential socialist measures and to protect, as a last barrier, the interests of the establishment more generally. Though the extent of consensus between the Labour and Conservative parties in Britain in the late 1990s should not be over-stated, the likelihood of an ideological clash crystallising into a dispute between political and legal actors receded. When disputes do arise, they often see the main political parties aligned against the judiciary, a state of affairs largely resulting from the introduction of the Human Rights Act and worsened by the frequent infringements of those rights which have been supposedly necessitated by attempts to obstruct terrorism, as well as a growing disrespect for the rule of law in areas such as immigration.⁵⁶ This state of affairs has been compounded by the fact that, in partially transposing the ECHR into domestic law, a new court became relevant to the domestic legal system,⁵⁷ which acts in a manner likely to disturb any complacent generalisations about how a pragmatic constitutionalist (of whatever stripe) *should* view courts. A commitment to ‘law and order’ is now as likely to lead one into conflict with courts as to attract the support of the judiciary.

We therefore find a strong anti-court rhetoric emanating from the right of the political spectrum indicating that there, as on the left, the judicial record, as well as its possible future direction, may have catalysed a rethink of attitudes towards the relative merits of political and legal actors and processes. This pragmatic re-evaluation is problematic. Its limits are undefined and so it encounters the problems inherent in all consequentialist thinking. If we are content with greater judicial involvement in decision-making, particularly as represented by decision-making in the area of fundamental rights, because the decisions being made at a

⁵⁶ The most important manifestation of which was the inclusion of an ouster clause in the Asylum and Immigration (Treatment of Claimants) Bill, which was strongly opposed by senior and retired judges. See Richard Rawlings, *Review, Revenge and Retreat*, (2005) 68 *Modern Law Review* 378, as well as the decision in *Jackson v Attorney General*, which is palpably, if not explicitly, conditioned by the dispute. At the time of writing (February 2013), the Government has consulted on further proposals aimed at limiting the availability of judicial review, which nevertheless fall far short of the sort of ouster clause likely to precipitate a genuine constitutional crisis.

⁵⁷ The specific form of that relevance is underdetermined by the statutory provision at issue, s.2 of the Human Rights Act 1998, which requires domestic courts to “take into account” the jurisprudence of the Court of Human Rights, though the Ullah principle, according to which it is a “duty of national courts... to keep pace with the Strasbourg jurisprudence as it evolves over time,” effectively strengthens that requirement considerably. See *R v Special Adjudicator ex parte Ullah*, [2004] 3 WLR 23, per Lord Bingham, at [20].

given moment in time are politically acceptable, how far are we from accepting the exclusion of democratic input from decision-making where we feel that judges and legal processes are likely to result in ‘better’ decisions in all or most cases? Political constitutionalism has a democratic core, and yet the pragmatic reconsideration on the basis of an improving judicial record tends towards juristocracy.⁵⁸ A limit must exist, but we have no a priori means by which to locate it. If political constitutionalism, given a new lease of life by its reappearance in a changed political context, is to maintain any semblance of respectability as a normative position, it must show itself to be something more than a contingent and temporary comment upon the judicial record at a given point in time and identify its core of principle.

7.5.1 Politics versus law

Regardless of the normative incompatibility of political and legal constitutionalism, they share certain presuppositions about law and politics. This involves the presentation of them as discrete and therefore mutually exclusive: what is essentially political cannot, by definition, be legal, and vice versa. The distinction must be advanced on institutional grounds, i.e. what makes law and politics distinct is that they are practices associated with certain sorts of institutions. Law is associated with the courtroom, its paradigmatic home, and the practices thereof - an adversarial process, between two parties whose arguments, if they are to be ‘heard’ by the court, must be couched in suitably legal terms, and whose resolution is left to a judge. The judge is a neutral participant whose continuing authority requires that the decision be couched in suitably ‘legal’ terms. Courts are defined by the imposition of limits on standing and can usually adjudicate only in cases where there is a live controversy, one of the parties to which is minded (and permitted) to bring the issue before it. Courts are similarly restricted in the range of remedies they can provide, usually limited to vindicating the rights of the parties to the case at hand and, where the case in question reaches the appellate level, perhaps also parties who will later present the same issue for resolution in the lower courts. What they cannot do is reconsider the law on a particular topic in its generality and so, if necessary, overhaul the entire edifice, nor place the law in its social context so as to judge

⁵⁸ Ran Hirschl, *Towards Juristocracy The Origins and Consequences of the New Constitutionalism*, Harvard University Press (2007), which portrays this shift as negative not merely because it involves extra power being placed in the hands of judges, but because that power is intended by the political elites who transfer it there to be exercised according to the logic of what Hirschl calls ‘hegemonic preservation’ - the protection of sectional neo-liberal policy preferences which are otherwise threatened by the democratic process.

what it is desirable to do (which is not to say that such considerations do not play a role in the adjudicative process - merely that they are not addressed holistically). Where this last exercise is carried out, it is either in marginal or controversial cases, or it takes place under the cover of darkness, being hidden by the court under a veneer of legalism so as not to undermine its legitimacy.

Political institutions on the other hand, operate through very different mechanisms: they may seek out problems to be solved, and enjoy the fact-finding capacity and democratic mandate which makes it both possible and proper to (re)consider entire areas of law in the context of public policy considerations and with the benefit of empirical evidence as to the law's effect on the social body. The 'remedies' such institutions can provide are limited largely by their own ambition and the brute reality upon which they are to be imposed. Such an institutional distinction of the legal and the political obviates the need to distinguish the phenomena upon the basis of the form of rationality peculiar to each - a position which was historically influential (most clearly as a crude formalism to which few if any now subscribe) but came under challenge by the realists, the critics and, to a much lesser degree, even orthodox positivists. It now survives mainly in the form of a Dworkinian approach more popular outside jurisprudential circles than within.⁵⁹ Institutional distinctions operate on a relatively objective level, at least in core cases.

Those patterns of thought which seek to legitimate or critique the practices of rights-review of legislation are united in keeping law and politics apart. But the relationship is more complex; thus defined, law and politics are not separate, but in fact frame and are contingent upon each other. Law is made by political institutions, whose very right to make rules, and the conditions - procedural and substantive - under which they must do so, are artefacts of the law. This means that the zero-sum strand of thought in (particularly political) constitutional thought whereby a constitution is either political or legal or, a weaker claim, that the greater the political element the lesser the legal, and vice versa.⁶⁰ It also, however, goes beyond those accounts which see the legal and the political as (merely) coexistent, and tells us something important about the use of law to protect rights. The first is that for the rights to be part of law in the first place, a political victory must have been won - the Human Rights Act, for example,

⁵⁹ Brian Leiter, *The End of the Empire: Dworkin and Jurisprudence in the 21st Century*, (2004) 36 Rutgers Law Journal 165.

⁶⁰ Graham Gee, *The Political Constitutionalism of J.A.G. Griffith*, (2008) 28 Legal Studies 20, at 21 and 29.

is part of domestic law in the United Kingdom only because the Labour Party in government chose to employ its political leverage to enact it: the law is not its own cause but is caused by politics. Secondly, and notwithstanding the natural inertia of law, the continued availability of rights in law is the function of a failure or an unwillingness to mobilise political actors to the extent of removing them. In the United Kingdom, this would require nothing more than any would any other legislative enactment or repeal, but even in a jurisdiction such as the United States where it would require a special process of supermajorities and state ratifications, the fact that the constitution continues to contain the specific rights that it does is only the contingent result of a failure to mobilise political will. This explains why it is right and proper that the rule of law be adhered to - if the executive does not wish to do or not do as the law requires, it is welcome to seek to have the law changed. In a parliamentary system like the United Kingdom, the executive is in a privileged position to do so. If it cannot have the law changed because it cannot vault the political hurdles, it is not entitled to invoke democratic considerations in support of its breach of law. This ensures that the executive pays the 'political cost' for that which it wishes to do.⁶¹ In the context of the on-going controversy regarding the issue of votes for prisoners, the government is welcome to ask Parliament to repeal the Human Rights Act in order to undo its domestic effect, rendering the rights it protects unavailable in the domestic courts, or to withdraw from the convention on Human Rights to which the UK voluntarily acceded in 1950 and a right of individual petition to which it has recognised since 1966. That it is not willing to do so, not willing to pay the political price at home and abroad, is not the fault of the Court of Human Rights. It also, however, demonstrates the naiveté of relying upon rights to protect against the vagaries of the popular will: not only do rights normally exist as the result of an exercise of that will via the political process, but their continued existence is contingent upon that same will not being exercised to remove them. In the long run, all of the relevant battles have been won politically, and if the political will turns against unpopular minorities with sufficient vigour, all the legal rights in the world will not protect them. It is for this reason that political constitutionalists have the better of the argument: even if rights protection has law and legal processes as its proximate cause, their continued availability in law is a function of political acts, institutions and process. No mechanism of entrenchment will ever change this, for even the presence of rights in a written constitution subject to amendment only by supermajority can be overcome through the dissolution of the power constituted in the legal order and a

⁶¹ R v Secretary of State for the Home Department Ex Parte Simms [2000] 2 AC 115, at 131, per Lord Hoffman.

return to the radical openness of constituent power. At all points, the victory which must be won and the defeat which must not be suffered, is one of politics.

7.6 From liberalism to republicanism

A republican consideration of the issue begins from the claim that by admitting the practices of rights review into the republican constitution, we give life to a situation of domination in which the dominating party is the judiciary - those who, when called upon to decide whether the legislation which emanates from the democratic organs is compatible with the rights protected, effectively possess the power to overrule the popular will. This claim necessarily portrays this process as qualitatively different from the ordinary role of the judiciary in applying the law (a process which promotes the legislative will rather than frustrating it). Worse, where the practices of rights review in question are, in their substance, amendable only by supermajority, the effect will be to have modern day political activity finding itself at the mercy of the priorities of long-dead individuals, as in the United States where the political discourse is often dominated by the consensus arrived at by a group of white men, as seen through the lens of competing interpretive approaches developed by other groups of (mostly) white men over successive centuries. Where its most outrageous elements have been consigned to history, the law was not leading but following - like the Owl of Minerva recognising the truth of what had been only as it began to fade from view. In this picture, rights review forces the people as a whole to live at the mercy of a document which determines the boundaries of what their governing institutions can and cannot do, as interpreted by judges whose political perspective can never be entirely kept at bay. Taken seriously, it would demand that no such rights were written into law.

Adam Tomkins comes perhaps closest to this outright rejection of the mechanisms of rights review, starting from the proposition that "there is a great tension between the ideals of republicanism and that most cherished of American constitutional practices, judicial review." He links his project to Griffith's political constitutionalism, but where Griffith declined to claim that political constitutionalism was normatively required - that "the constitution is no more and no less than what happens" and therefore that "everything that happens is

constitutional”⁶² - Tomkins, starting from this ‘tension’, finds in republicanism an ideal against which legal constitutionalism can be assessed and, ultimately, rejected in favour of political constitutionalism: “It is through republican political philosophy that we can obtain a normative foundation for our practices of responsible government and political accountability.”⁶³ Where others make rights review an indirect form of participation, Tomkins argues instead that the republican ideal sets the bar sufficiently high as to exclude it entirely: “Republicanism is concerned not with government-through-judiciary but with *self*-government through processes of informed, public-spirited deliberation.”⁶⁴ Rights review, which withdraws power from the community at large and denies the public interest a role in the decision making procedure (where it would tend to subvert strict legality), finds no place. This is buttressed by a further consideration of the issue from a non-domination perspective which, unlike concerns about self-government and deliberation, is distinctly neo-republican:

“The point of freedom is not that is should never be interfered with but that, when it is (necessarily, inevitably) interfered with, the interference comes from a source whose authority over us is legitimate rather than illegitimate. Legitimate authority, for a republican, is authority without domination. This means authority that is neither arbitrary nor capricious, but which is reasoned and is contestable at the instigation of those who are subject to it.”⁶⁵

The difficulty of bringing proceedings, as well as the restricted range of remedies on offer in the courts would seem to render the judiciary illegitimate by this standard, even before problems such as the unrepresentative nature of the judiciary are brought into the equation.

Pettit demonstrates impatience with ‘populists’ who believe that power is to be maintained wholly within the legislative organs because they “think that any leakage of law-making power, whether in the direction of the judiciary and the executive, has to represent an inherent evil; it means that the law is made by someone other than the people or their representatives.”⁶⁶ Having rejected populism in his consideration of democracy, he similarly

⁶² Griffith, note 40, at 19.

⁶³ Tomkins, *ORC*, note 40, at 51.

⁶⁴ Tomkins, *ORC*, note 40, at 45.

⁶⁵ Tomkins, *ORC*, note 40, at 49.

⁶⁶ Pettit, note 1, at 180.

rejects such objections to the practices of the rights-constitutionalism, considered by him an attempt to push the virtues of self-government beyond what is required to secure non-domination and into the territory of positive freedom. Pettit's positive argument for the sort of counter-majoritarian protection of which rights review is a central example (he notes also bicameralism and a supermajority requirement for constitutional amendment) is straightforward:

“Majorities are easily formed... and majoritarian agents will exercise more or less arbitrary powers if their will is unconstrained. Let the laws be subject to ready majoritarian amendment, then, and the laws will lend themselves to more or less arbitrary control; they will cease to represent a secure guarantee against domination by government.”⁶⁷

On the surface this is convincing: as we are reminded, counter-majoritarian measures arise from a belief that mere majority support (particularly as refracted through the distorting lens of a non-proportional electoral system) is not equivalent to ‘goodness’ in law - an alternative value is called for and supplied, in neo-republicanism, by non-domination. There are, however, problems here. It is not clear that it is correct that majority decision making leads to “more or less” arbitrary decisions and, if it does, why are majority decisions which do not infringe rights any more acceptable than those which do? If majority decision-making is sufficient to give interferences an arbitrary character, republicanism has a problem with all majoritarian decision-making processes. By what process are we to determine the identity of the interests which receive this special protection; the contexts in which majoritarian decision-making slides from acceptability into unacceptability? Further, we have argued that the relationship between the legal and the political is such that the law is the contingent outcome of the political process. For this reason it would be insufficient to have legal rights which were capable of overriding legislation, but which themselves were capable of being over-ridden by the ordinary legislative process: they must presumably be entrenched, therefore subject to amendment only by supermajority. This does not remove the problem so much as lessen the frequency with which it becomes apparent: even those entrenched rights will themselves be contingent on the inability of political processes (albeit more demanding ones) being mobilised against them. Ordinary majorities cannot therefore tyrannise ordinary

⁶⁷ Pettit, note 1, at 181.

minorities, but the tyrannical capacity of super majorities is undisturbed and all the more dangerous. The more the rights are needed, the less likely they will be able to fulfil the role for which they were designed. Political, not legal, processes will determine whether public power reduces freedom. Why, then, does Pettit adopt the legal constitutionalist solution of attempting to circumscribe politics by law, rather than to strengthen the political processes upon which law is ultimately contingent themselves?⁶⁸ And of course, this entire argument assumes that the roles which are protected through law are rights which we would want to be protected. The US constitution suggests that we cannot take that point for granted, and if it turns out that the rights are not so desirable, their entrenchment is even more problematic.

Though not derived from the non-domination ideal, Isueult Honohan's observations on the topic are a useful counterpoint. Pettit had noted that what was distinctive about republicanism's view of the role to be played by rights was the relatively weak normative standard they embodied in comparison to the general role of freedom in republican thought, and the comparatively minor role legal rights play in securing freedom compared to their role in liberal thought. Honohan endorses the notion that unlike liberal thought, "[r]epublicanism is not essentially rights-based, and it does not conceive of rights in the sense of absolute, individual, natural, pre-political, or moral constraints of individuals against a secondary political order."⁶⁹ This fact is not determinative of how the abstract theory should be translated into a set of specific constitutional proposals, however: that it "is not a rights-based theory does not determine the status of judicial review."⁷⁰ For that reason, Honohan moves towards the same conclusion at which Pettit had arrived: rights review is compatible with the standards of republicanism. But, moreover, it makes a considerable contribution to the protection of freedom and so, ultimately, comes to be seen as positively desirable. Republican constitutionalism is a paradigm of the situation in which legal rights are held to be desirable notwithstanding the rejection of pre-political moral rights, the exact converse of Waldron's

⁶⁸ This is a question which might be asked in the context of legal constitutionalism as applied to the practices of the United Kingdom: when shortcomings were identified with the functioning of the constitutional order, why was the solution to be found in the imposition of legal limits upon power (e.g., the incorporation of the ECHR, which eventually took place in the form of the Human Rights Act 1998?) Why not strengthen or reform the political processes which limited the exercise of public power? Relevant here is Lord Hailsham's comment that the problems of the United Kingdom's constitution lay "not in an excess of democracy, but in too little." Lord Hailsham, *The Dilemma of Democracy: Diagnosis and Prescription*, Collins (1978), at 226.

⁶⁹ Isueult Honohan, *Republicans, Rights and Constitutions: Is Judicial Review Compatible with Republican Self-government?*, in Samantha Besson and José Luis Martí (eds.), *Legal Republicanism: National and International Perspectives*, Oxford University Press (2009), at 90.

⁷⁰ Honohan, note 69, at 90, note 19.

project. The principle fails to rule it out and a consideration of consequences - of whether rights review of legislation rather than bare majoritarian democracy would do more for non-domination - commends it.

Honohan frames the supposed incompatibility between rights review and democracy in a distinctive way, suggesting that judicial review might be conceptualised as a constraint on legislative, rather than popular, sovereignty, where the latter rather than the former is the essence of democracy. Rights review is incompatible only with one instantiation of the wider concept of self-government, much as “the ‘last word’ of the judiciary on the constitution is ultimately part of a wider political process,”⁷¹ an reminder of the fact that where the requisite political will exists, the decision of a court will not be what it seems: rather than a final and immutable answer to the question asked, it is the ‘law’ only until the applicable law is changed. The mutual framing of the legal and the political upon which we have insisted becomes an argument *for* rights review which operates by minimising the significance of its effects in practice. The political will prevails as long as it is patient and able to fulfil the more demanding criteria required by constitutional amendment as compared to the ordinary legislative procedure. For this reason, Honohan suggests that where judicial review is combined with a more flexible amendment procedure (perhaps including, she suggests, parties other than the legislature) the republican requirement of self-government might be fulfilled.⁷² This is a counter-intuitive conclusion given that the lesser flexibility of the constitution is presumably intended in part to frustrate the sort of damage that an ordinary majority in the legislature might do: why insist upon embedded rights if we place alongside them a flexible amendment procedure that undercuts their constitutional status? The answer of course is a nagging doubt as to the democratic credentials of rights review - an itch which cannot be scratched and is only postponed through the erection of distinctions which purport to show how mechanisms of rights review can be anything but anti-democratic. Again, it is not clear why our focus is on imposing a legal solution to a problem which requires stronger political institutions.

⁷¹ Honohan, note 69, at 101.

⁷² Honohan, note 69, at 99.

7.6.1 The arbitrariness of rights

Liberal democracy, in attempting to secure the individual against the state, does not protect freedom. Instead, it protects freedoms - a series of particular interests which are identified as deserving of special protection. There is no universal agreement on the interests in question, though some recur across time and space, while others are more particular. Even those which are found in a number of rights documents vary dramatically in their scope and framing. We have seen already that Pettit does not answer the question of how the particular interests which he claims should be protected through counter-majoritarian mechanisms within the republican constitution should be identified. Bellamy places this lacuna at the heart of his rejection of rights review of legislation and its two “depoliticising strategies.” The first consists of “seeking to establish boundaries to the political sphere, designating certain values and areas as beyond the realm of politics” so that “political bodies and their agents ought not to interfere with individuals”⁷³ in ways which violate their rights: essentially the phenomenon previously labelled ‘rights-constitutionalism’. However, there is no sphere outside of politics and so, says Bellamy, “the attempt to depoliticise certain areas of social life proves impossible.”⁷⁴ It is, we might add, the most political of acts, not, now, because of the identity of those to whom we ascribe decision-making capability, but merely because that capability is withdrawn from the political organs and their political process; attempting to do this, as rights-constitutionalism does, is “itself arbitrary and produces arbitrary rule that is dominating and potentially oppressive.”⁷⁵ The republican constitution, aimed at preventing domination, must reject rights-constitutionalism, a source of domination.

It is therefore insufficient to declare a desire that rights review form part of our institutional structures: we must also be able to decide in a non-arbitrary fashion what the content of the rights should be. Bellamy suggests that two conditions of universality (“able to sustain in a plausible manner their claim to be fundamental and universal conditions of a just social order which are capable of applying equally to all individuals”) and sufficient determinacy (“precise enough for us to be able to apply them to concrete circumstances, and the criteria defining what counts as a right stringent enough to prevent each and every goal or preference

⁷³ Bellamy, note 32, at 147

⁷⁴ Bellamy, note 32, at 153.

⁷⁵ Bellamy, note 32, at 147.

that we have becoming the subject of a human right”) apply.⁷⁶ Given the impossibility of satisfying both of these criteria, Honohan’s (‘rights are not inherent in the republican ideal, but are worth having anyway’) is rendered illegitimate. The depoliticizing effect brought about by the creation of a fundamental legal rights can only be applied arbitrarily so should not be applied at all. This observation brings into sharp relief the fact that arguments for rights-review are often unconcerned by the content of the rights protected. This is a strange omission and a prominent critique of rights review focuses on the manner in which certain rights consistently come to dominate the practices.⁷⁷ The relationship between rights and freedom will vary according to the content of the rights in question, a fact whose truth is demonstrated by a consideration of the role the first half of this chapter assigned to processes of democracy: that of ensuring that public power does not come to be available for one private party to use to dominate another. The next chapter will proceed on this basis.

7.7 Conclusion - on democracy and rights

We have considered the application of the ideal of non-domination to the field of constitutional theory, noting the many ways in which it can contributing to the discipline, many of them paths already travelled, others strangely neglected in the literature. It has been argued that the record of republican constitutionalism has often been one of undistinguished replication of liberal orthodoxy but that this failure is not fatal to the enterprise. The focus in the literature on domination deriving from imperium and the corresponding neglect of that which results from dominium is, however, unfortunate, and suggest our next steps. In the following chapters we will consider a republican constitutionalism which starts from the problem of horizontal domination.

⁷⁶ Bellamy, note 32, at 148.

⁷⁷ Hirschl, note 58.

Part 3 - Chapter 8: Rights versus Freedom: The Right to Property

8.1 Rights

In chapter 7, we canvassed issues of constitutional design within republican constitutionalism. It was suggested that the reason for the failure of neo-republican constitutionalism - its frequent repetition, in republican terms, of liberalism's questions and, more problematically, of liberalism's answers - is that it has failed incorporate the necessary concern for horizontal unfreedom, having inherited the liberal presupposition that the individual, to be free, need be protected only from the state. This chapter and the next consider the neo-republican constitution in light of the problem of horizontal domination and, in particular, the conclusion reached in part 2: that the primary source of horizontal unfreedom is property, and that the state, having recognised property and thereby put its coercive apparatus at the disposal of man against man, is obliged to ensure that the distribution of property does not found a relationship of domination. For that reason, both chapters deal with the theme of property: firstly in relation to the right to property and then in relation to the role of money within the political process.

8.1.1 The neo-liberal state and relationships of freedom

In the post-war period and perhaps before it, it was reasonable to fear the state first and foremost, and perhaps solely. But what was once a perhaps justifiable assumption as to the identity of parties liable to infringe freedom is now, as far as the many of the major liberal-democracies are concerned, a relic of a world that has begun to pass into history. Too much constitutional theorising relies on unstated assumptions as to the continuity of the old model activist state which must be restrained, or at least overseen with increasing vigilance, and takes as proof of this fact the increased activity of the state in relation to, for example, national-security. The current work rejects this assumption. Its claim is not a denial of the freedom-reducing nature of much of the state's activity, nor of its special status amongst a multiplicity of heterogeneous threats to freedom; one cannot, however, read over from those areas of its activity in which the state can and does do too much to those in which the available evidence suggests it is more likely doing too little. More particularly, one cannot observe (correctly) that the state remains liable to reduce freedom and presume on that basis

that it *alone* is liable to do so. This is not to downplay the major interferences which the state continues to perpetrate on a small number of individuals and on certain groups as a matter of course. Those interferences have become increasingly well-targeted and efficient, and are a legitimate and indeed compelling target of those who value freedom. It is merely to understand the true nature of unfreedom as it features in the lived experience of the average citizen, who is not as a matter of course locked up, 'rendered' to some far-off land and tortured there; nor even is he likely to be the target of the more general excesses of the surveillance state that has emerged domestically. For the common man, his unfreedom is more likely in relation to the employer who exploits him in return for a wage he cannot afford to live on; the landlord who jacks up the price of his rent at every opportunity - or, worse, a bank which offered him a sum for his mortgage and then contributed to the development of an economic collapse which undermines his ability to repay it. In each scenario, the situation of economic imbalance into which the average child is born means that anything other than this horizontal unfreedom is unthinkable - it can be overcome, certainly, but normally only by the few, and certainly never by all. For this average person, unlike the suspected terrorist, member of the suspect community, or more general 'other' against which the resources of the state are too-often directed, the problem is not that public power overreaches - not that the state does too much, but that it does too little - or that what it does exacerbates these inequalities rather than reducing them. The situation which results from this failure to act and the renunciation of the actively regulatory role the state is uniquely placed to play is very often one of unfreedom, just as much as the unfreedom of those who more directly encounter the coercive apparatus of the state: to fail to see this is bad enough, but to justify the rolling back of the state on the grounds of freedom is unforgivable.

Keeping in mind always the relational nature of the concept - freedom and unfreedom are not properties of an individual but instead statements about the how that individual stands in relation to some other entity - we have sought to shed light on the role of law in directly constituting the specific relations - such as that of husband and wife - which may or may not transpire to be relationships of unfreedom. This role includes setting the rules which determine how the legal relation is formed; the circumstances under which it may be ended, and the specific consequences which follow in law from formation and dissolution - in short, the conditions under which the coercive apparatus of the state will intervene, and the identity of the parties against whom and on whose behalf they will do so. Most such relations,

however, are not so directly regulated as is that between husband and wife. Instead, they occur against a background distribution of wealth and other legal entitlements which similarly implicate public power, and which therefore already determine the circumstances of the intervention of public power and which condition even ostensibly ‘free bargaining’ between ‘equal’ individuals, as our consideration of the impact upon horizontal freedom of certain key rules of labour law has hopefully shown. This background permits for the generalisation of our argument about horizontal unfreedom in private relationships: if such a relationship is one of unfreedom (i.e., if one party is permitted to arbitrarily interfere with another’s interests and can rely on either (a) not confronting a form of public power set on preventing the interference or punishing it *ex post*, or (b) garnering the support of that same public power for that interference) it is invariably because the law - which determines criminality, ownership, rights and obligations etc - is as it is. Freedom, then, is not primarily a function of the extent of public power, but of the conditions, set by law, under which that public power will intervene, against a background of property in which public power is inescapably implicated.

8.2 The right to property and freedom

We have spoken of the problems inherent in the idea of using rights to protect freedom. The overarching difficulty of such an approach is that the rights available in law are available only as the outcome of a political process: they derive from a victory of either ordinary politics or constitutional politics, and remain available in law only until a political victory of the same sort is won by those who desire that the right no longer be available. Legal rights are to that extent best understood as a semi-permanent concretisation of a political victory which attempts to preserve a fleeting political consensus upon which further progress might be built. They indicate an interim success rather than an end to the ongoing war. For that reason, their role in the protection of freedom is real but derivative, secondary to the political processes and disputes by which they come to exist. They contribute to freedom, both as non-interference and as non-domination, but in neither case are primary. Such, at least, is the case for the standard liberal rights: to privacy, to freedom of religion, or expression or association.

This is not necessarily the case for the specific right which we choose to take as the focus of this chapter, however: the right to property. Instead, it is our argument that while the right to

property might provide this same sort of contingent, semi-permanent guarantee of non-interference or non-domination, as the case may be, to those who own property, considered from the point of view of those to whom it applies as a whole, its contribution is better understood as dual and conflicting. Given that ownership implies the state's willingness to interfere with all non-owners, then to the extent that a legal right guarantees non-interference with the owner, it prevents interference calculated to promote the interests of the non-owner. What this means is that a legal right protecting the distribution of property is not merely unlikely to promote freedom, nor to advance its achievement equally in relation to all persons, but will promote non-interference differentially in proportion to the property that each person does or does not own. If, as we have suggested, property, and particularly the iniquitous distribution thereof, is a key element of horizontal relationships of domination, then this treatment of property by rights not merely puts in place a differential vertical relationship with regards to property, but will potentially act to obstruct the reconfiguration of the distribution of property. This gives the legal right to property a specific importance to our project far beyond that of the other rights within the system: a fuller consideration is necessary if we are to understand its exact role. This chapter will aim to provide that fuller consideration.

It might be argued that such an account, and in particular the singling out of one legal right amongst many, is incompatible with the foregoing presentation of the relationship between fundamental rights and democratic politics; that if all rights which exist in law do so as the result of a democratic process, then this must be equally true for the right to property. If so, then the problem of the right's continued existence in law is itself a problem not so much of law as of democratic politics. And in a sense this is correct: whether subsisting in ordinary law, or in a higher-order fundamental law, the right to property has the same contingent existence as do all others. But the same distribution of property which gives this right its added importance from the perspective of horizontal non-domination threatens to distort the political process via which this result would be achieved: the right's existence may be contingent but, as we shall see in chapter 9, it is also self-perpetuating. This combination of circumstances, whereby property is protected by a right whose existence in law is determined by a politics which itself is potentially guided, or in fact distorted, by that same property both justifies and indeed necessitates a consideration of the issue from both angles: that of the

right which protects property, and of the democracy which is troubled by it. Hence the consideration of the former in this chapter and the latter in the next.

8.2.1 The history of the legal right to property

The French Declaration of the Rights of Man and of the Citizen of 1789 included a provision stating that “The aim of all political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.” The idea of a natural and imprescriptible right to property implies the possibility of a settled distribution of property which logically precedes the legal apparatus which is concerned merely to recognise and protect it. Absent a fuller understanding of how one acquires such a natural right, of the sort provided with varying degrees of success by Locke¹ and Nozick,² the notion of a natural right to property is both indeterminate and insufficient. Such a point was made in response to the declaration of the existence of property rights by Bentham, who asked:

“Good: but in relation to what subject? for as to proprietary rights - without a subject to which they are referable - without a subject in or in relation to which they can be exercised - they will hardly be of much value, they will hardly be worth taking care of, with so much solemnity.”³

More coherent is the other central mention of property in the 1789 declaration, which states that “Since property is an inviolable and sacred right, no one shall be deprived thereof except where public necessity, legally determined, shall clearly demand it, and then only on condition that the owner shall have been previously and equitably indemnified.” Such provision finds parallels in a variety of other legal declarations: that found in the Fifth Amendment to the US Constitution takes the less ostentatious form of a prohibition on the deprivation of property “without due process of law” and prevents public authorities from taking “private property... for public use, without just compensation.” Nevertheless, by juxtaposing a provision which ascribes to property the status of a natural right and one which makes alterations to the structure dependent on law, the French declaration highlights some

¹ John Locke, *Two Treatises on Government*, Cambridge University Press (1988), at 285-302.

² Robert Nozick, *Anarchy, State and Utopia*, Basic Books (1974), at 149-231.

³ Jeremy Bentham, *Anarchical Fallacies*, in Jeremy Waldron (Ed.), *‘Nonsense Upon Stilts’: Bentham, Burke and Marx on the Rights of Man*, Taylor & Francis (1987) at 57.

of the problems inherent in the concept of a legal right to property, which will become clearer when we turn to examples of the law on this topic.

A prohibition on deprivation (except under specified circumstances) may be coupled with a more general right to own property, as in the Universal Declaration of Human Rights which grants the right “to own property alone as well as in association with others,” meaning, it seems, little more than that no-one is excluded from the category of persons who may own property - not that any particular persons necessarily will in fact own particular property, or anything at all.⁴ Taken together with the two forms of the right to property exemplified by the 1789 declaration, this provisions means we can find real-world examples of three of the four potential forms of the right to property identified by Jeremy Waldron: immunities against expropriation (as in the Fifth Amendment); natural property rights (as in the claim that property is a ‘natural and imprescriptible right’); and eligibility to hold property (as in the UNDHR).⁵ The fourth, the general right to have private property, is mostly unknown to law - “found more in philosophical monographs than in political constitutions,” as Waldron states⁶ - and must be distinguished from a right to universal property ownership where the property is held not individually but in common. It has nevertheless begun to emerge as a feature of modern constitutions, albeit limited to specific forms of property (such as housing) rather than property in general.⁷

8.3 Article 1 of Protocol 1

The variant of the right to property in the ECHR scheme is found in Article 1 of the First Protocol to the Convention (A1P1), which was intended to fill some of the gaps left by the hurried drafting of the convention itself and, in particular, the exclusion of rights to property,

⁴ UNDHR, Article 17. The other mention of property is as one of the grounds upon which it is not permissible to distinguish in the enjoyment of the various rights and freedoms (Article 2).

⁵ Jeremy Waldron, *The Right to Private Property*, Clarendon Press (1988), at 16-24.

⁶ Waldron, note 5, at 23.

⁷ E.g., s.26(1) of the Constitution of South Africa (1996) states that “Everyone has the right to have access to adequate housing.” This implements the logic of the UNDHR, Article 25 of which provides that “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.” Despite the landmark decision in *Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 which seemed to vindicate the constitutionalisation of such a right by holding that the state was obliged to take positive action to provide housing, the claimant in eventually died 8 years later, still homeless: see Jeff King, *Judging Social Rights*, Cambridge University Press (2012), at 63.

education and free election.⁸ The inclusion of the right to property was opposed in particular by the United Kingdom and Sweden.⁹ Reasons given for opposition included the claim that the right to property was out of place in a list of civil and political rights, and that inclusion potentially opened up the economic policies of contracting parties to review by an international tribunal.¹⁰ Before the latter had even entered into force, as it did on the 3rd of September 1953, the Protocol was being drafted; it was opened for signature on the 20th March 1952 and entered into force on the 18th of May 1954.¹¹ Drafting proved difficult - an early draft made reference to 'arbitrary confiscation' as being disallowed, but floundered on a suggested definition of arbitrariness as being ruled out by the payment of compensation.¹² Similarly abandoned was, intriguingly, an attempt to define legitimate interference with the right in terms only of the use, rather than the ownership, of property, which would have entailed a significantly higher - and possibly unworkable - level of protection for possessions.¹³ In its final version, the full text of the Article reads:

“Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

⁸ For an account of the circumstances of the drafting, see Theo R. G. van Banning, *The Human Right to Property*, Interstentia (2002), at 64-78. See also Danny Nicol, *The Constitutional Protection of Capitalism*, Hart Publishing (2010), at 134-6. Nicol makes two points of importance for present purposes – firstly, that a deliberate choice was made to exclude from A1P1 a right to compensation upon deprivation and, secondly, that by the time the First Protocol was signed by the United Kingdom, a Conservative government had replaced the post-war Labour government whose enthusiasm for nationalisation caused it to view the right to property as particularly problematic.

⁹ R. Anthony Salgado, *Protection of Nationals' Rights to Property Under the European Convention on Human Rights: Lithgow v. United Kingdom*, 27 Virginia Journal of International Law 865, at 881-2.

¹⁰ Salgado, note 9, at 882.

¹¹ Ed Bates, *The Evolution of the European Convention on Human Rights: From Its Inception to the Creation of a Permanent Court of Human Rights*, Oxford University Press (2010), at 100.

¹² A. H. Robertson, *The European Convention on Human Rights: Recent Developments*, (1951) 28 British Yearbook of International Law 359, at 361

¹³ Robertson, note 12, at 361

Unsurprisingly, given the gap which exists between the rhetoric of negative freedom and the reality of necessary interference within the human condition of plurality, the wording of A1P1 acknowledges its limitable nature. It does so, however, in a manner which is distinct from the standard conditions for justified interference with one's convention rights, as evinced by Articles 8-11 of the Convention itself. Under those, any interference must, to be justified, take place in pursuit of a specified 'legitimate aim' from amongst those (generous) aims identified in, and varying between, the various Articles. Moreover, the legitimate interference must take place 'in accordance with law' or 'in a manner prescribed by law' - a requirement which comprises both bare legality, so that no interference can be legitimate if carried out without legal authority, and certain standards of precision and accessibility designed to ensure that any interference is non-arbitrary.¹⁴ Most importantly, however, the interference must be 'necessary in a democratic society.' The requirement of necessity in practice implements a proportionality test - a rule which can mean either that there must be a reasonable relationship of proportionality between the ends pursued and the means chosen or, more strictly, that an interference is legitimate if and only if necessary to achieve the (legitimate) aim pursued, this latter interpretation representing what is known in the EU context as the 'least restrictive means' test.¹⁵ The addition of the reference to a 'democratic society' reflects the belief that in such a society, fewer interferences will be considered necessary than in other forms of political organisation. From the general 'necessary in a democratic society' test it therefore follows that the more pressing is the aim being pursued, the greater the interference that can be effected, but that if there is a less restrictive means available for the pursuit of the identified aim - if the same effect could be achieved with a lesser interference - then the greater interference is not, by definition, necessary, and is likely forbidden. The court considered the strength of the phrase 'necessary' as compared to various

¹⁴ So, for example, "the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case... a norm cannot be regarded as 'law' unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail." *The Sunday Times v United Kingdom* (No. 1) (1979) 2 EHRR 245, at 49. See also *Malone v United Kingdom* (1985) 7 EHRR 14.

¹⁵ In EU law, the principle of proportionality is found in Article 5 of the Treaty on European Union, which provides that "The use of Union competences is governed by the principles of subsidiarity and proportionality" (5(1)) and that "Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties." (5(2)). For an overview, see Gráinne de Búrca, *The Principle of Proportionality and its Application in EC Law*, (1993) 13 Yearbook of European Law 105.

plausible alternative tests in *Handyside v United Kingdom*,¹⁶ positioning it at the stricter end of the range employed throughout the convention:

“whilst the adjective ‘necessary’, within the meaning of Article 10 (2), is not synonymous with ‘indispensable’, neither has it the flexibility of such expressions as ‘admissible’, ‘ordinary’, ‘useful’, ‘reasonable’ or ‘desirable.’”¹⁷

The relative strictness of proportionality scrutiny is exemplified by the Strasbourg court’s judgment in *Smith and Grady v the United Kingdom*.¹⁸ In the Court of Appeal, the administrative discharge of four soldiers on the grounds of their sexuality had been (in those pre-Human Rights Act days) tested for its rationality, with the Master of the Rolls, Sir Thomas Bingham, accepting that because the human rights of the applicants were infringed, a greater justification would be required to justify the rationality of the decision,¹⁹ but holding that even by this stricter standard, the decision to discharge was not irrational.²⁰ The Strasbourg court held that there had been an Article 8 violation and that, because the domestic courts had applied the threshold of irrationality (albeit modified in response to the interference with rights) the applicants had been denied their right to an effective remedy under Article 13: “the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants’ rights answered a pressing social need or was proportionate to the national security and public order aims pursued.”²¹ The proportionality requirement in the context of the ECHR varies, but even its weaker form necessitates a stricter scrutiny than traditionally permitted in English administrative law.

¹⁶ (1979-80) 1 EHRR 737.

¹⁷ (1979-80) 1 EHRR 737, at 754.

¹⁸ (2000) 29 E.H.R.R. 493.

¹⁹ [1996] QB 517, at 554. Sir Thomas Bingham MR regarded the test, adopted from the submissions of David (now Lord) Pannick for the applicants, as a distillation of the principles laid down in *R v Secretary of State for the Home Department, Ex parte Bugdaycay* [1987] A.C. 514 and *R v Secretary of State for the Home Department, Ex parte Brind* [1991] 1 A.C. 696.

²⁰ [1996] QB 517, at 558.

²¹ (2000) 29 EHRR 493, at 543.

8.3.1 The conditions for legitimate control

This general scheme of proportionality is not part of A1P1, which, on its face, lays down different conditions for the control of the use of property and for the deprivation of that same property. Control of use must be effected through law, but the only further limitation is that the state must deem the particular controls placed upon the use of property to be necessary “in accordance with the general interest.” It is unclear whether the clause on taxes and contributions or penalties modifies all of “to enforce such laws as it deems necessary to control the use of property in accordance with the general interest” or only the second or third parts of it. The former seems unlikely, as it would remove from the levying of taxes the requirement of legality. The latter, the notion that “to secure the payment of taxes or other contributions or penalties” substitutes for “in accordance with the general interest” implies an absurdity: it leaves us with “to control the use of property [...] to secure the payment of taxes or other contributions or penalties” which suggests a right to control property insofar as necessary to collect taxes, rather than the slightly more urgent right to levy taxes (which surely constitute a deprivation) in the first place. It seems, therefore, that instead the “to secure the payment of taxes or other contributions or penalties” is an alternative to “to control the use of property in accordance with the general interest”, leaving us with “to enforce such laws as it deems necessary [...] to secure the payment of taxes or other contributions or penalties” and that the requirement of legality imposed by the phrase “such laws” is intended to apply alike to the imposition of taxes and penalties.

8.3.2 The conditions for legitimate deprivation

The conditions for legitimate deprivation determine that it is legitimate only where both lawful (referring both to general principles of international law and to plain ‘law’ - the domestic law of the contracting party) and in the public interest. Taken at face value, the conditions for the lawful deprivation of property are pleasingly weak: unlike the most prominent qualified rights discussed above, here the grounds upon which an interference can be justified are not limited to a series of specified situations - the legitimate aims, such as ‘public order’ or ‘public health or morals’ which are given in the second paragraphs of Articles 7-11. This would seem to permit deprivation on the basis of legislative ends not countenanced by those Articles: social justice, perhaps. At its extremes, it might be the cases

that one can truthfully say that, objectively, it is in the public interest that a particular person no longer owns a certain thing. Nor is there a textual requirement equivalent to the “necessary in a democratic society” clause which in practice determines the outcome of the majority of cases involving those same qualified rights: the proportionality test which that clause implements would therefore seem to be absent from the list of conditions for justification.

8.3.3 The public interest in deprivation

Instead, the sole explicit requirement beyond that of legality is that deprivation be “in the public interest.” There are several possible interpretations of this - the first is that the deprivation is required to contribute in some fashion to the public interest, regardless of whatever drawbacks it may entail. This threshold is too low to be practicable, particularly if public interest is defined subjectively and so decided by the state’s authorities themselves. Such interpretation would effectively establish the rule that deprivation occurs on the say so of the state, but that rule is already included in the requirement of legality. A second plausible interpretation is that the public interest in deprivation need only be greater than the public interest in non-deprivation: in utilitarian terms, this would ensure the only negative utility relevant to the legitimacy of deprivation is that which relates to the public generally, rather than to the property owner, the harm to whose private interest would, on this reading, be irrelevant. Such public disutility might result from, e.g., any uncertainty introduced into the scheme of domestic property rights by an act of expropriation, avoidance of which is a prominent aspect of practically-oriented conceptions of the rule of law in the contemporary world. Therefore, to the extent that an act is seen as justified, or even necessary, it may have no negative consequences as far as the public interest is concerned if faith in the scheme of property rights would remain intact. Alternatively, “in the public interest” might be interpreted as requiring that the public interest be balanced against its assumed counterpart, the private interest - constituted by the enjoyment of the right established by A1P1, in determining whether or not a deprivation is a legitimate interference with the right in question. This interpretation directly confronts the subjective disutility of the individual whose right to enjoy his or her possessions is being interfered with the public interest in deprivation and so is the interpretation which best fits with the purpose of A1P1 as suggested by its first sentence - to protect the peaceful enjoyment of one’s possession - and which best reflects the heightened interest one has in one’s own possessions, which will usually provide a practical

or emotional utility that far outweighs any potential contribution that their expropriation might make to the public interest. Even weighing public against private interests will justify deprivation only in exceptional cases.

There are two points that should be emphasised about the text of A1P1. The first is that, taken literally, it suggests that deprivation can never be justified on the basis that it contributes to the specific interests of a particular private actor or actors: only if the case can be translated into public interest terms will it be capable of over-riding the private interest of the owner in the enjoyment of his or her possessions and justifying deprivation. The second is that each of the plausible interpretations offered here takes us to be working with a form of balance: a creative or perverse interpretation might alter the answer to the specific question of what exactly is being balanced against what, but there is nothing in the wording of A1P1 which is equivalent, even nearly so, to the ‘necessary in a democratic society’ requirement found in Articles 7-11 of the convention and on which has been founded the test for proportionality. So, the converse of the first point, that deprivation can never be justified in terms of the private interest, but instead must find a public interest argument, is that where the deprivation is, on balance, in the public interest, the relationship between it and any particular aim would seem irrelevant.

8.4 The A1P1 jurisprudence of the Court of Human Rights.

The Court of Human Rights has interpreted A1P1 in a manner which tracks but complicates its plain textual existence. That it has been required to interpret the provision to address novel claims and unforeseen circumstances is not problematic; that in doing so it has strengthened the position of property owners vis-à-vis those who stand to them, potentially, in a relationship of horizontal unfreedom is more so.²² Starting with the *Sporrong and Lönnroth v Sweden*,²³ the Court has repeatedly held that the Article comprises 3 distinct rules.²⁴ The first sentence of the first paragraph - “Every natural or legal person is entitled to the peaceful enjoyment of his possessions” - contains the first rule, which is of a “general nature”, and

²² Danny Nicol calls this a “judicial upgrade” of the right (note 8, at 138), suggesting that it is part of a pattern whereby transnational legal regimes act to prevent nation-states from pursuing policies which conflict with certain requirements of neo-liberalism.

²³ (1982) 5 EHRR 35.

²⁴ (1982) 5 EHRR 35, at [61].

“enounces the principle of peaceful enjoyment of property.” The second sentence - “No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law” - lays down the rule we have previously identified regarding the conditions for the legitimate deprivation of property. Similarly, the second paragraph institutes the second rule identified above: the conditions for the legitimate control of the use of property.²⁵ The second and third rules are considered in the jurisprudence of the court to be specific instantiations of the first rule and so are to be interpreted in the light of the general principle it lays down.²⁶ Measures which are intended to pursue goals other than directly control the use of property are dealt with under the first rule.²⁷

8.4.1 Justifying an interference

When the Court is considering whether any given interference with the 3 rules it enumerated in *Sporrong* is justified it will refer to the ‘fair balance test’, described as follows:

“the Court must determine whether a fair balance was struck between the demands of the general interests of the community and the requirements of the protection of the individual’s fundamental rights... The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article 1”²⁸

The description of this as a fair balance test reflects the fact that the conceptual scheme of the conditions for legitimate deprivation differ significantly from those in Articles 7 to 11 of the convention with their tripartite ‘proportionality’ test. It is unfortunate, then, that the test has come to be assimilated with - in the jurisprudence of the Court of Human Rights and the United Kingdom’s domestic courts alike²⁹ - with that of proportionality. In *Sporrong*, the Court emphasised that part of what was unacceptable about the treatment of the applicants

²⁵ (1982) 5 EHRR 35, at [61].

²⁶ *James v United Kingdom*, (1986) 8 EHRR 123, at [37].

²⁷ E.g., *Erkner and Hofaur v Austria* (1987) 9 EHRR 464.

²⁸ (1982) 5 EHRR 35, at [61].

²⁹ Unsurprisingly, in light of the combination of the requirement to ‘take into account’ the jurisprudence of the Strasbourg Court in s.2 of the Human Rights Act and the ‘Ullah principle’ which governs its use and works to strengthen the s.2 requirement in the context of issues which Strasbourg has addressed. For the Ullah principle, see *R v Special Adjudicator (ex parte Ullah)* [2004] UKHL 26, at [20], per Lord Bingham.

was that they “bore an individual and excessive burden,” the language of proportionality not yet being employed.³⁰ When the Court revisited that discussion in *James and Others v United Kingdom*,³¹ it made the link between the two vocabularies explicit, stating that there must exist a relationship of proportionality between means and ends, and that this requirement had been “expressed in other terms in the *Sporrong and Lönnroth* judgment by the notion of the ‘fair balance’ that must be struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.”³² The Court thereby retrospectively reconceptualised the fair balance test as including one of proportionality, and the ‘individual and excessive burden’ of the applicants in *Sporrong* was now identified as the paradigm of disproportionality, rather than as an example of an unfair balance. The proportionality requirement has been frequently restated, and the primary reason for which the Court will hold that a fair balance has not been struck is that the interference challenged did not meet this requirement of proportionality.

The Court has occasionally suggested that what it is imposing here under heading of a proportionality requirement is not in fact a proportionality requirement of the type which exists elsewhere in the Convention. In *James v United Kingdom*, it addressed the claim that the availability of an alternative (less onerous) method of achieving the same aim was indicative that the measures in fact taken were not necessary and therefore disproportionate. Under the ‘necessary in a democratic society’ clause which recurs in Articles 7-11, this would be taken to indicate that the interference was not proportionate. Here, however, the Court suggested that a consideration of alternative forms of interference represented an attempt to read “a test of strict necessity into the Article, an interpretation which the Court does not find warranted” - instead:

“The availability of alternative solutions does not in itself render the [interference] unjustified; it constitutes one factor, along with others, relevant for determining whether the means chosen could be regarded as reasonable and suited to achieving the legitimate aim being pursued, having regard to the need to strike a “fair balance”³³

³⁰ (1982) 5 EHRR 35, at [73].

³¹ (1986) 8 EHRR 123.

³² (1986) 8 EHRR 123, at [50].

³³ (1986) 8 EHRR 123, at [51].

Taken seriously, this aspect of the court's jurisprudence pushes back against the heightened scrutiny potentially introduced by its shift from fair balance to proportionality, leading to what we might describe, in language the court itself occasionally employs, a requirement of reasonable proportionality, rather than strict necessity. Under such a requirement the means/ends calculation is still the subject of judicial scrutiny, and so we are closer to a typical proportionality test than to the image of a fair balance test that the text of A1P1 suggests is appropriate. The requirement is looser, however, than would be a strict proportionality requirement, in that there are a variety of means which bear a reasonable relationship of proportionality and so there is no compulsion to choose the least intrusive option. It is not clear that the move from fair balance to proportionality is justified (implying, as it does, a heightened scrutiny); it is not, however, as grievous an injustice as would have been a move to strict proportionality.³⁴

8.4.2 Possessions

Scrutinising the deprivation or controls on the use of possessions presupposes a method of identifying what is a possession and who it is that the possessions belong to. This question is therefore of central importance the application of A1P1, but logically prior to it and so no part of the court's explicit consideration of the issue. In keeping with the broader French term 'biens' used in that version of the Convention, the Court has been clear that 'possessions' is an autonomous concept, "certainly not limited to ownership of physical goods."³⁵ It can apply to what is described generally as an asset, and it is sufficient for the purposes of the Article to demonstrate that one enjoys a legal interest with, crucially, an economic value.³⁶ A legal right, for example, can be a possession for the purposes of A1P1 (and, indeed, where one seeks to invoke A1P1, it is necessary that ownership be recognised as a matter of domestic law.³⁷ This positivistic requirement prevents A1P1 claims from being transformed into the language of

³⁴ But see *Hentrich v France* (1994) 18 EHRR 440, discussed by Nicol, note 8, at 142.

³⁵ *Gasus Dosier-und Fordertechnik GmbH v Netherlands* (1995) 20 EHRR 403, at [53]

³⁶ See, in the domestic context, *Murungaru v Secretary of State for the Home Department* [2008] EWCA Civ 1015, summing up the reasons for rejecting an A1P1 claim in relation to a contractual right of which the applicant, a former Kenyan Government Minister, claimed to have been deprived: "They are intangible; they are not assignable; they are not even transmissible; they are not realisable and they have no present economic value. They cannot realistically be described as an 'asset'. That is the touchstone of whether something counts as a possession for the purposes of A1 P1. In my judgment Dr Murungaru's contractual rights do not." (at [58]).

³⁷ *S. v the United Kingdom* (Application No. 11716/85) (1986)

natural right and thereby frees the courts from an impossible inquiry into the moral foundations of the right of which the applicant claims to have been deprived. It also, however, gives the system of rights protection a bias towards the interests of those who are recognised as the legal owners of property. Also potentially possessions for the purposes of A1P1 are a legal entitlement to rental income,³⁸ the goodwill or clientele of a business,³⁹ a license to sell certain products,⁴⁰ and intellectual property.⁴¹

This makes sense - these legal rights are merely a variation of the general scheme of property, whereby the fact that something 'belongs' to me or you is a function of legal rules: this extension of the concepts is therefore logically sound, though where it is implemented, the effect is to significantly extend what would otherwise be the scope of the protection offered by A1P1. Excluded, however, are those possessions which are not yet sufficiently established in their existence, such as the right to income which has not yet been earned.⁴² Where the status of a right under domestic law is not established beyond doubt, the right, in order to count as a possession, must be something more than a mere 'hope': there must exist a 'legitimate expectation' which has a more concrete status. So, for example, in *Kopecký v Slovakia*,⁴³ the applicant claimed that his A1P1 rights had been interfered with, but the future possession had been contingent upon the applicant satisfying a domestic court that certain statutory requirements were fulfilled. The Strasbourg Court noted that its jurisprudence "does not contemplate the existence of a 'genuine dispute' or an 'arguable claim' as a criterion for determining whether there is a 'legitimate expectation' protected by [A1P1]... where the proprietary interest is in the nature of a claim it may be regarded as an 'asset' only where it has a sufficient basis in national law, for example where there is settled case-law of the domestic courts confirming it."⁴⁴ The effect of this is to create a continuum representing the crystallisation of a legal right as it moves from representing a hope towards something actual rather than merely speculative, with 'a significant basis in law' marking the threshold beyond which the legal right enjoys the protection of A1P1. There is thus an incentive for public

³⁸ *Mellacher v Austria* (1989) 12 EHRR 391

³⁹ *Van Marle v Netherlands* 8 EHRR 483 at [41]. For the issue of goodwill in domestic law, see *R (Malik) v Waltham Forest Primary Care Trust* [2007] 1 WLR 2092.

⁴⁰ *Tre Traktor Aktiebolag v Sweden* (1989) 13 EHRR 309

⁴¹ *Smith Kline and French Laboratories Ltd. v Netherlands* (1990) 66 DR 70, an admissibility decision regarding the challenge to the grant of a compulsory license under the applicant's patent.

⁴² *Ian Edgar (Liverpool) Ltd v United Kingdom*, Reports of Judgments and Decisions 2000-I, at 465; *Wendenburg v Germany* (2003) 36 EHRR CD 154, at 169.

⁴³ 41 EHRR 43.

⁴⁴ 41 EHRR 43, at [52].

decision makers to deprive private actors of a right before that right is well settled, for when that happens, it becomes an interference with the A1P1 right and the relevant requirements of justification kick in.

8.4.3 Public interest between fair balance and proportionality

The fact that the proportionality requirement has been imposed by the Court of Human Rights upon a textual structure that does not at first sight imply it, has the effect of distorting the process by which proportionality is judged. The conditions for justified deprivation under A1P1 are not restricted to the pursuit of a series of predetermined aims (as in the contexts in which the proportionality requirement is based upon the ‘necessary in a democratic society’ phrasing) but instead makes reference to a concept (the public interest) broad enough to take in not just all of the specific legitimate aims references in Articles 8-11, but also, it would seem, any other legitimate aim of the state, excluding a priori only those actions which are specifically taken in order to confer a purely private benefit.⁴⁵ This should, if the distinction is respected, leave greater scope for legitimate interference with the A1P1 right(s) than is available in relation to those rights where justification is restricted to a specified list, which can only ever be a subset of the full range of aims that the state might want to pursue.⁴⁶ The difference is likely to be marginal, however, given that those rights of which legitimate interference is restricted to a given set of predetermined ends are nevertheless generous in the ends they specify (both in their general substance and specific phrasing), and because the Court is similarly generous in its interpretation of the question - few challenges succeed as a result of the inability of the contracting party to identify a legitimate aim which would encompass the actions it has taken. Nevertheless, this consideration is indicative of the issues raised by the Court’s presumption that a requirement of proportionality can be imposed even where the language of the convention does not demand it.

⁴⁵ For example, “a deprivation of property effected for no reason other than to confer a private benefit on a private party cannot be ‘in the public interest’. Nonetheless, the compulsory transfer of property from one individual to another may, depending upon the circumstances, constitute a legitimate means for promoting the public interest.” *James v United Kingdom*, (1986) 8 EHRR 123, at [40].

⁴⁶ A similar point is evident in the impasse reached in domestic administrative law regarding the development of a standalone proportionality ground (outside the common law rights and ECHR contexts in which it is currently recognised) – see *R (Daly) v. Secretary of State for the Home Department* [2001] 3 WLR 1622. Such a development was strongly argued for by Dyson LJ in the Court of Appeal in *R (Association of British Civilian Internees: Far East Region) v. Secretary of State for Defence* [2003] EWCA Civ 473, at [32]-[35], but a proportionality test requires the identification of a protected interest, the interference with which must be tested against the importance of the aim being pursued and it is not clear that where no such interest can be identified, proportionality is capable of doing the work currently done by the *Wednesbury* unreasonableness test.

8.4.4 Fair balance and proportionality

Even once the aim of interference has been identified, there is no reason in the text of A1P1 to assume that a certain relation need subsist between the aim and the method of its pursuit: the specific relationship of proportionality implied by the phrase ‘necessary in a democratic society’ should be no part of a fair balancing test, which would seem to permit interferences that fulfil the public interest requirement whether or not they are proportionate to the specific ends pursued. Only by substituting proportionality for fair balance does the means/ends nexus come into play.

The effect of this substitution is compounded by the creation of an association between the requirement of proportionality and the specific phraseology of ‘an individual and excessive’ burden from *Sporrong*. The deprivation of property will always constitute an individual burden on its owner under a system of private property, and so ‘individual’ here must be assumed to mean applying only to a specific or small number of persons. There is a danger lurking here, for the more iniquitous the distribution of property in any given legal system, the more likely it is that any given deprivation for the purposes of redistribution will fall upon a small number of persons - if an ‘individual’ burden demonstrates that the interference is disproportionate, there will come a point at which the conditions for legitimate deprivation run up against a system of property where the only deprivations that are not ‘individual’ are those which have as their subject the have-nots, rather than the haves. The ‘excessive’ test is similarly troubling, in that it can be understood to indicate that the burden is measured by reference to the amount of property of which the owner is deprived; a better understanding would consider not what is taken, but what is left, either absolutely, or in terms of its relation to the quantity of property of which the owner has been deprived. The more one owns, the greater the deprivation should be permissible, particularly in light of what has been said about the extent to which material inequality’s status as a primary constitutive factor in many relationships of horizontal unfreedom. Attempts to limit vertical (liberal) unfreedom through restrictions upon the actions of public authorities contribute to the ossification of horizontal relationships of (republican) unfreedom.

The effective substitution of the proportionality test for that of a mere balancing test raises the bar for legitimate interference with the right. This is difficult to accept as correct. Rights discourse struggles to reconcile the rhetoric of negative freedom (as non-interference) on which it is based with the bare reality that the fact of social existence renders impossible any hope of that freedom ever being respected. Much of human rights law is about filling that gap with details as to the specific conditions as to how and why the rights may be infringed - all the while sticking to a vocabulary of freedom that is less and less suited to describing the reality. The necessity of interference means it must be accepted but regularised as part of the wider rule of law requirement. What we see in the jurisprudence of the court of human rights is a progressive denial of that reality through restrictions on legitimate interference which themselves threaten the practicality of that social existence by potentially cementing an inequality which is unsustainable in the long-term and in the meantime renders those who are without wealth unfree in relation to those who are.

8.4.5 Compensation

Perhaps the aspect of the Court's A1P1 jurisprudence which is most difficult to accept is that relating to compensation. The right contains within it a compensatory principle which is similar to that found in general international law (in relation to non-nationals only), to which reference is made in the second of the three rules: without such a principle, which can be evaded only in exceptional circumstances, "the protection of the right of property... would be largely illusory and ineffective..."⁴⁷ Such a conclusion is justified on the basis not that it would not be in the public interest to deprive without compensation (it will surely frequently be in the public interest to not have to pay compensation), but that "the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable."⁴⁸ This is a clear example of the requirement of proportionality (even 'reasonable' proportionality, without any suggestion of a strict necessity test) rendering the conditions for legitimate interference more difficult to meet. This statement was followed by an acknowledgement that 'an amount reasonably related to its value' does not equate to full value and that certain objectives of the public interest "such as pursued in measures of economic reform or measures designed to

⁴⁷ *Lithgow v United Kingdom*, (1986) 8 EHRR 329, at [120].

⁴⁸ (1986) 8 EHRR 329, at [121].

achieve greater social justice, may call for less than reimbursement of the full market value.”⁴⁹ Only in exceptional circumstances will less than full value be acceptable and the Court’s decisions include examples of it requiring the payment of compensation even where extremely strong considerations of this type are at issue. Where the interference is a control on the use of property rather than a deprivation thereof, the payment of compensation will generally result in a finding that there has been no violation of A1P1, but unlike in cases of deprivation, it is not necessary, as a rule, to pay compensation in order to have struck a fair balance, notwithstanding that the control of the use may have consequences for the economic value of the property.⁵⁰

8.5 Stran Greek Refineries

One can multiply examples of circumstances in which the entitlement to compensation has been upheld notwithstanding the seemingly exceptional nature of the circumstances in which the deprivation was carried out. In the *Stran Greek Refineries* case,⁵¹ the Greek state, while under military rule, had concluded a contract for the construction of a crude oil refinery; following the return to democracy, the contract was terminated on the basis that it was prejudicial to the national economy. The state instigated an arbitration procedure and then, after the arbitration board had made an award of compensation against it, legislated to deprive the arbitration award of effect. The Greek government’s offered to the court by way of explanation the rationale that “[t]he democratic legislature had been under a duty to eradicate from public life the residual traces of measures taken by the military regime. [The other party to the contract] had been a giant of the economy and the scheme that he had envisaged had at the time been on a huge scale for a country the size of Greece. Moreover, the announcement of the scheme had led, before the fall of the military regime, to one of the largest anti-dictatorship demonstrations.”⁵² The Court accepted that “the brutal practices of the military regime weighed more heavily on the scales of public interest than claims based on transactions concluded with that regime” but noted to the contrary that it would be “unjust if every legal relationship entered into with a dictatorial regime was regarded as invalid when

⁴⁹ (1986) 8 EHRR 329, at [121].

⁵⁰ This distinction is reflected also in the Charter of Fundamental Rights of the European Union, Article 17 of which prescribes ‘fair compensation’ in the case of deprivation of property, but not where its use is controlled.

⁵¹ (1995) 19 EHRR 293.

⁵² (1995) 19 EHRR 293, at [45].

the regime came to an end.”⁵³ Even though there was no doubt that the economic interests of the State required the contract to be cancelled, the cancellation of the arbitration award was held to be a violation of the A1P1 rights of the applicant.⁵⁴ The property interests of a wealthy businessman were privileged above those of the Greek people, who were in this way called upon to pay for the deeds of a regime they had no hand in choosing. This is the side to human rights protection which is often obscured by a discourse which puts at its forefront the ability of legal rights to protect the weak and vulnerable. Legal rights are a tool like any other and cannot be assumed to promote an unambiguous social and moral good.

8.5.1 What are exceptional circumstances?

This is not to say that ‘exceptional circumstances’ can never be demonstrated. The leading case in which the non-payment of compensation was not held to breach the requirements for justification of deprivation is *Jahn and others v Germany*.⁵⁵ The applicants were the heirs of so-called ‘new farmers’ who had been settled in Soviet-occupied East Germany in 1945 on land specified for agricultural cultivation. In 1990, as part of the impending move towards a free-market economy, restrictions on disposal of the land were removed, making the farmers the owners of the land they occupied, regardless of the use to which it was being put at that point. In 1992, after German unification, a new reform, aimed at ensuring that those who were not making agricultural use of the land did not unfairly benefit, required the applicants to assign the land to the tax authorities, without compensation. The Chamber of the Court held unanimously that the 1992 reform was not a justified deprivation of property and so there had been a violation of the applicants’ A1P1 rights.⁵⁶ The Grand Chamber disagreed: given that the deprivation was lawful and non-arbitrary, “the lack of compensation did not of itself make the State’s taking of the applicants’ property unlawful.”⁵⁷ It entered instead into a consideration of the historical context of the case, noting that the property rights of the ‘new farmers’ were a reflection of the collectivist system rather than standard property rights, and that “if the GDR authorities had consistently applied the rules in force at the time, the

⁵³ (1995) 19 EHRR 293, at [71].

⁵⁴ The action taken by Greece also had implications under Article 6 on the basis that “The principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute.” (1995) 19 EHRR 293, at [49].

⁵⁵ (2006) 42 EHRR 49.

⁵⁶ (Application nos. 46720/99, 72203/01, 72552/01), Judgment of January 22, 2004

⁵⁷ (2006) 42 EHRR 49, at [95]

applicants, who were not farming the land themselves and were not members of an agricultural cooperative, would not have been in a position to keep it.”⁵⁸ Deprivation without compensation is, as we have seen, permissible only in exceptional circumstances, but “the State has a wide margin of appreciation when passing laws in the context of a change of political and economic regime.”⁵⁹ The German unification process was particularly distinctive in this regard and three factors eventually lead the Grand Chamber to hold that lack of compensation did not upset the fair balance that the domestic authorities were required to strike: firstly, “the circumstances of the enactment of the Modrow Law [the 1990 reform], which was passed by a parliament that had not been democratically elected, during a transitional period between two regimes that was inevitably marked by upheavals and uncertainties.”; secondly, the German authorities had more important issues to resolve and cannot have been expected to apprehend the need to remedy an unjust land reform immediately following reunification; and, thirdly, “the [unified] parliament cannot be deemed to have been unreasonable in considering that it had a duty to correct the effects of the Modrow Law for reasons of social justice” - specifically, the acquisition of property rights under the 1990 reform was a ‘windfall’ and so “the fact that this correction was made without paying any compensation was not disproportionate.”⁶⁰ The language of the Grand Chamber’s judgment, however, strongly underlines the ‘uniqueness’ of the context of German unification: this is unfortunate, for if one is willing (as one should) to recognise that existence of certain property rights as the result of a ‘windfall’ is not exceptional, but in fact a common feature of the existence of private property and, in particular, the neo-liberal policies of many Western countries in recent years, which have seen state assets sold off below market value, this exceptionality would seem less obvious.⁶¹ Were this more fully appreciated, the refusal of compensation in the public interest would be a permissible feature of a legitimate deprivation much more frequently than it has been and, probably, will continue to be. It is perhaps telling that in the context of its summary of its finding on the point as to the legitimacy of the interference, the Grand Chamber, states that “the lack of any compensation does not upset the “fair balance” that has to be struck between the protection of property and

⁵⁸ (2006) 42 EHRR 49, at [104]

⁵⁹ (2006) 42 EHRR 49, at [113]

⁶⁰ (2006) 42 EHRR 49, at [116].

⁶¹ Paul A. Grout, Andrew Jenkins and Anna Zalewska, *Privatisation of Utilities and the Asset Value Problem*, (2004) 48 *European Economic Review* 927, noting, at 928, that in the privatisation of utilities (with the exception of telecommunications), the processes have “been characterised by both undervaluation and underpricing.”

the requirements of the general interest.”⁶² That finding is much more easily digested when the language of fair balance is retained than it would be in the terms of proportionality; we could expect to see more like it if the court were more comfortable sticking to that vocabulary.⁶³

8.6 The progressive undermining of legitimate deprivation

A general right to compensation, subject to exceptions in cases so extreme they will almost never occur, goes a long way to undermining the conditions for legitimate deprivation: the state can never deprive a private individual of his property in an absolute sense, only exchange it for something of an equal economic value. This ignores both the extent to which the very value of the property may have been augmented or indeed created by the state, and the fact that the public interest will at times be served, quite legitimately, by the expropriation of property for the purpose of its redistribution, over and above the relatively modest system of redistribution facilitated by taxation. What this means is that while the state can give away public property and can create value where none existed before, it can (almost) never reverse the process. We have seen that the absence of a restricted list of specified ends means that, on paper at least, the right to property can be restricted in pursuit of a broader and more ambitious set of public interest aims. The right to compensation smuggled in by the court as part of the shift from a textually-grounded fair balance test to one which emulates the proportionality requirement elsewhere determines this looser standard. The state is permitted to expropriate, but it will normally be required to leave you no less well off than you were to begin with. What without a general presumption in favour of compensation might be defended as encouraging contestability in its presence becomes a strong presumption in favour of the status quo, largely undermining the wider range of grounds for legitimate interference with A1P1 rights, the most important of which will thereby be placed out of reach by the compensation requirement: our earlier example of social justice falling perfectly within this category.

⁶² (2006) 42 EHRR 49, at [117].

⁶³ See also the recent (failed) A1P1 challenge to the scheme by which Northern Rock Plc was taken into state control: *R (SRM Global Master Fund) v HM Treasury* [2009] EWCA Civ.

8.7 The positivism of property

The absolutist logic of freedom as non-interference is unsuited to the human condition of plurality and so many of the interests that are protected by rights are inevitably restricted, such that the law seeks to regularise rather than exclude interference with them. This is true of all those natural interests which are not logically unrelated to the fact of living in a political environment. It applies in a far stronger form, however, to those interests like the right to property which are not part of man's natural existence, but come into being only where there exists a system of public power. For it is only when such a system exists that it becomes meaningful to speak of a thing as belonging to this person or to that one, or to speak of somebody having this or that legal right. This is the view expressed by Bentham, who insisted that "there is no such thing as natural property... it is entirely the work of law."⁶⁴ The two phenomena are both co-original and mutually dependent: "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases."⁶⁵ As in our earlier consideration of Bentham, we must here insist that what is important is not merely law, but the existence of an organised public power whose deployment it governs. Such a positivistic perspective does not preclude the possibility of discussing, in a different register, the existence and extent of one's moral right over certain possessions, or to certain things, but it does capture the reality of what a property right implies. Property law, along with the law of contract, answers the question of who it is to whom state will lend its coercive capacity - its monopoly on legitimate violence - and under what conditions. To say I own a piece of property 'x' means that if somebody else attempts to take 'x' without my consent, the state will deploy the mechanisms of its criminal law against that person. It means roughly that when I contract to sell 'x' in conformity with the conditions laid down by law, the state will recognise, and if necessary, enforce that transaction and, at the apposite moment, become available to intervene on behalf of the person who now, under its law, is the owner. Conversely, if anyone else attempts to similarly contract with that which is legally recognised as mine, the state will not normally enforce it.

⁶⁴ Jeremy Bentham, *The Theory of Legislation*, Routledge (1931), at 111.

⁶⁵ Bentham, note 64, at 113.

8.7.1 The inescapability of restrictions upon property

So property law does not just identify the party to which the state's coercive apparatus will be lent: it similarly lays down the conditions under which public power will come to the assistance of that power. This is true in the first place of the criminal law, which goes a long way to regulating the use that can be made of one's property, but more generally to private law rules which regulate, for example, the conditions under which a disposal must take place if it is to be recognised by law. The truth of this statement implies a further argument about the nature of the right to the enjoyment of one's property: it is never unrestricted, but always and everywhere limited to enjoyment, disposal, transfer or loan etc, according to the conditions laid down by the ordinary law of property. This fact - that ownership is an artefact of law, caused by it and therefore subject to the conditions it imposes - explains the common thread between those different legal rights to which A1P1 applies: moveable and immovable property, contractual rights and everything recognised as a possession demonstrated that for the purposes of A1P1, a possession is something to which the applicant has a legal right. If the right is legal, it is an artefact of the legal system, and so all of these are things which 'exist' only because the law of the land, at a certain point, says they do.

8.7.2 Deprivation in the light of positivism

This background - the fact that not only is ownership determined by law, but that the law also by definition places limits of what one can do with one's property, not exceptionally or intermittently, but as part of the very institution of property itself - demonstrates why the legal right to property has such a vexed existence. Consider the earlier cited propositions of the French Declaration of the Rights of Man and of the Citizen, which juxtaposes two provisions with different bases and in doing so exemplifies the confusion that a mixing of registers can precipitate. It firstly asserts that property is a natural (so pre-legal) right, which it is the purpose of any political association to protect, and secondly asserts that no deprivation can be effected by law without compensation. But how are we to answer the question of who owns what if not by law? We are left to rely upon the idea that law is obliged to recognise pre-existing natural rights and that, having done so, it is limited in its capacity to disturb them. But this involves freezing the value of the distribution of rights and obligations at a certain point in time: the same questions of moral desert which are at work in the

recognition of property - the unquestioning transmutation of a pre-legal moral claim into a moral right, backed by public force - are excluded in the consideration of deprivations. A move away from this mixing of registers - an attempt to protect the right to property without mixing registers (without, that is, claiming that property is to be protected through law because it precedes law) does not solve the problem of unjustifiably privileging the distribution of wealth at a particular point in time.

8.7.3 What is a deprivation?

Let us consider what it means to deprive someone of his possessions in light of this account of the nature of property rights. We first have something ‘a’ which is the possession of person ‘b’, meaning that under the relevant legal system, ‘b’ is recognised as having a legal right to ‘a’, which in turn can be translated into the proposition that in certain defined circumstances, public power can be objectively expected to intervene on behalf of ‘a’ against any other person, and not on behalf of any other person. Assuming that the necessary condition of legality is met (as we can agree it should be in all cases, regardless of the right involved, without prejudicing a discussion of the normative desirability of each right), then a deprivation involves changing the law so that person ‘b’ no longer has, under that legal system, a right to ‘a’ meaning, again, that there are no longer any circumstances in which public power will intervene on b’s behalf against others, and perhaps, that the law now identifies some other person as owner, and therefore the person to whom the state’s coercive apparatus will be lent if necessary. In a crude, albeit telling sense, we are left here with an absurdity: one has a legal right to peaceful ownership of one’s possessions as recognised by law, but where a deprivation has taken place by means of the ordinary law, they are no longer, as far as that law is concerned, one’s possessions. This confirms what we probably already suspected: that a positivistic account of property encounters a legal right, A1P1, which cannot be understood in similarly positivistic terms.⁶⁶ Nor though, does it seem that there is an explicit moral dimension to the concept of ownership implicit in A1P1 - the Court’s approach

⁶⁶ On this point, see Jeremy Waldron, *The Rule of Law and the Measure of Property*, Cambridge University Press (2012), at 38-41. Waldron notes that James Tully’s interpretation of Locke’s incorporation of property rights within a substantive rule of law principle is that of opposing a positive right to positive right, of saying that it protects property “only in the sense of positive law rights of property already established by legislation,” but that to do so deprives it of any force: “the price of that deliverance is that the property rights in question, being the offspring of legislation, can have very little power and status to set up against legislation.” (referencing James Tully, *A Discourse on Property: John Locke and his Adversaries*, Cambridge University Press (1980), at 98 and 164-5.)

does not involve asking, in general terms, who it is that has a moral right to a given thing, of which he or she was previously the legally recognised owner: we do not return to the 1789 declaration's solution of asking who was the owner before law, or who would be the owner without law, for, we see now, such a question makes no sense.

8.7.4 Considering the issue diachronically

Instead, we are left to understand that the problem can only be understood diachronically. At a given point in time, T1, the domestic legal system recognised a certain person as the owner of a certain thing. The law, however, has been changed, whether by legislative act or judicial decision, such that at a later point in time, T2, the law no longer recognises that person as owner. It is sufficient to establish the ownership at point T1 (indeed in most cases the question is not explicitly dealt with)⁶⁷ and it is no part of the pattern of decision making under A1P1 to question how it was that the right in question came to belong to the applicant; how it was that the possession at issue came to be that of the person who now challenges the deprivation.⁶⁸ Instead, the question asked is whether there has been a deprivation - if there has, then it will by definition be illegitimate if unlawful or, in almost all cases, if compensation has not been paid. And yet a failure to confront that first question means that we will never be sufficiently cognisant of the role of the state in constructing and amending the current distribution of rights and obligations. It leads to a situation in which it seems that the state may award property (rights) to one person or another - not just in the general sense that all legal rights imply a recognition by law, but also in the specific sense that particular persons can be granted rights over particular things - but not deprive those persons of that same property (rights): it gives but it cannot take away, A1P1 being "essentially a guarantor of the existing distribution of property."⁶⁹ As was suggested when considering the Greek

⁶⁷ The exception would be those cases in which ownership is not accepted by the domestic authorities of the contracting party and so it is necessary to distinguish between a mere hope and a legitimate expectation (possibly on the basis of settled case law) of a sufficiently concrete nature to amount to a possession. See the discussion above.

⁶⁸ Waldron canvasses arguments of this sort in Hume, Bentham and Margaret Radin, who justify property in terms of the human need for legal stability and so are substantive correlatives of formalistic rule of law conceptions but notes that such arguments promote the stability of property rights generally, and not private property rights specifically. He concludes that it is preferable to keep the advantages of private property separate from those of the rule of law: "Arguing in Rule-of-Law terms for property, markets, and economic freedom is simply too distracting. It bogs us down in debates about substantive conceptions and about the sticks in the bundle that are specially privileged as a matter of legality." Waldron, note 67, at 54-75.

⁶⁹ Nicol, note 8, at 137.

monasteries case, above, the status quo is irrationally privileged. Quoting Bentham again, though of course responding to a declaration of property as natural right:

“according to this clause, whatever proprietary rights, whatever property a man once has, no matter how, being imprescriptible, can never be taken away from him by any law: or of what use or meaning is the clause? So that the moment it is acknowledged in relation to any article, that such article is my property, no matter how or when it became so, that moment it is acknowledged that it can never be taken away from me...”⁷⁰

To the article of the declaration governing the conditions for a legitimate deprivation, Bentham, eternally utilitarian, replies that the problem of deprivation is “one of those questions of detail that requires to be settled, and is capable of being settled, by considerations of utility deducible from quiet and sober investigation.”⁷¹ His comments on the reference to necessity are a useful reminder of the absurdity of that concept - or anything close to it - applied to the question of deprivation of property: “Does necessity order the making of new streets, new roads, new bridges, new canals? ... If not, there is an end to all improvement in these lines.”⁷² We might ask, in the same vein, whether the public interest might not require that the majority of the population not be forced to live at the mercy of the small minority which now possess a grossly disproportionate quantity of the wealth in the United Kingdom today.

This problem is particularly acute in the context of explicit transfers of property from public to private hands: A1P1 protects the right of a private individual to property which is privately held, but therefore fails to protect property which is common to all, meaning that the sum total of common property can be reduced and that of private actors augmented without confronting any of the obstacles that A1P1 sets up for those who are signatories to the First Protocol wishing to conduct the opposite operation. There can only ever be a net increase in the quantity of property in private hands. Neo-liberal initiatives such as the privatisation of

⁷⁰ Bentham, note 3, at 58.

⁷¹ Jeremy Bentham, *Anarchical Fallacies*, in Phillipp R. Schofield and Catherine Pease-Watkin (eds.), *Rights, Representation, and Reform: Nonsense Upon Stilts and Other Writings on the French Revolution*, Oxford University Press (2002), at 375.

⁷² Bentham, note 71, at 375.

various amenities are rendered all but irreversible (in light of the requirement of compensation) and, given taxation is an accepted exception to the right to property, the Article might be considered to incentivise high taxation, for once settled in the hands of a private actor, the state's options for the redistribution of property are severely limited. There is a similar difficulty in the idea of a right to not have the use of one's property controlled, for the use of property is always and everywhere already controlled. What the right must refer to then, is not controls themselves, but to new controls on the use of one's possessions - to controls that were not previously part of the bundle of rights attached to one's possessions, but which now are; controls can be reduced without the possibility of challenge by those who are thereby disadvantaged, but not increased.

8.8 Conclusion

It is the argument of this thesis that the public law contribution to the project of protecting freedom is principally made through democratic processes, rather than rights, as is normally suggested. For the average citizen, the most important relationships of freedom and unfreedom are those with parties to which they stand horizontally and it is democratic mechanisms which are best able, in the future as in the past, to address that unfreedom. Democratic mechanisms determine the content of private law, which sets the conditions under which one private actor will be able to call upon and make use of the coercive apparatus of the state against another and controls the mechanisms of wealth 'redistribution' through taxation and expenditure. They are therefore central to the project of procuring that freedom that is most lacking in modern society. From this point of view, rights to property, such as the found in Article 1 of Protocol 1, are more likely to inhibit the pursuit of freedom than promote it. Requirements of legality are to be welcomed for, as we have seen, the exercise of power without legal basis is by definition arbitrary. Less central, but still justifiable, is the requirement the deprivation be in the public interest - deprivation will frequently be desirable as much because of its contribution to the interests of other private actors, quite apart from whether or not it is in the interests of the wider public interest, and the right should more clearly reflect that. The slide by which the fair balance test becomes a stricter proportionality test renders more difficult this pursuit of freedom and contributes to paradoxes inherent in the legal protection of legal rights. It was argued in chapter 7 that legal rights are not capable of doing the work assigned to them, in part because they are the

outcome of political processes and their continued availability in law is contingent on the failure to employ the political process to remove or repeal them. This remains true in the case of A1P1 - the United Kingdom could withdraw from the protocol or remove A1P1 from the list of convention rights in the Human Rights Act 1998. That it does not seek to do either is not surprising: where the political discourse denigrates rights, it is the rights of foreigners, prisoners and Muslims which are usually at issue - not those of the owners of property: a group who are not normally under-represented in the political process. The democratic process is sufficiently permeable to wealth that the radical redistribution of that wealth, though it would revive an old strand of republican theorising and promote the horizontal freedom the masses of the population by freeing them from the domination of their wealthy peers, is unlikely to become a priority. The following chapter examines some of the hows and whys of that process.

9.1 Democracy and freedom

In contextualising the normative commitments of modern republican thought, a distinction was drawn early in this thesis between civic republicanism - the ideas of which were prominent within the revival of republican thought in the 1980s and 90s - and the neo-republicanism whose emergence in the mid to late 1990s I have termed the second republican revival. One of the arguments made for the superiority of the latter over the former was its relative coherence - though undoubtedly important, many of the central concepts of civic republicanism are inherently vague and so often insufficiently precise to attempt to translate into practice. The comparative merit of the neo-republican ideal, however, is not merely that it is relatively precise, well-suited to analysis of actually-existing legal systems and political institutions, but that it is framed in such a way as to bring within it, by logical implication, certain of those civic republican themes and commitments. The key example of such logical implication was the manner in which the relational nature of neo-republican understanding of freedom (the non-domination ideal) captures the older republican commitment to plurality in that it remains coherent only in a context in which multiple persons co-exist: an important theme of the tradition recurs in a purer form as a corollary of the non-domination ideal. This is, however, merely one of many points at which the specific neo-republican ideal implies a shared commitment to ideas that have historically been important elsewhere in the tradition. This chapter concerns another.

Our argument has moved on significantly since the neo-republican ideal was introduced and defended, and part 2 of this thesis was devoted to the application of the neo-republican non-domination requirement to the context of the horizontal relationships between private parties. Its conclusion spoke to the centrality to the existence or non-existence of individual freedom of what we called ‘ordinary’ law - the private law of rights and obligations which, against a background distribution of property and other private law rights, structures the bargaining relationship between one individual and another and so determines, in large part, whether and to what extent individuals must live at the mercy of others. The elaboration of a republican constitutionalism, it has been argued, can take place only against this background - one of the key functions of public law is to specify the process by which ‘ordinary’ law is made, and the

conditions to which it must adhere. Only by considering the form of constitutional order best suited to the production of non-arbitrary outcomes can we tie together our themes of horizontal and vertical domination. On that basis, we have argued that the right to property, to the extent that it hinders the redistribution of property which might otherwise condemn men to live at the mercy of other men, potentially inhibits rather than promotes the pursuit of freedom - cementing the arbitrary power enjoyed by some of those who own property to interfere with the interests of some of those who do not. Instead, we have argued for the centrality of democratic processes in preventing and undoing domination, their importance being confirmed by the fact that even those rights which exist in law do so as the contingent outcome of political processes. In short, democratic processes have historically been and continue to be the *only* way to redress the imbalance in the coercive options (including the distribution of property) available to private parties against one another, which must take place if we are to achieve our goal of securing freedom that meets the dual - horizontal and vertical - standards of neo-republican thought. But while the manner in which rights such as that to property place off-limits certain substantive facets of life, protecting them from legislative interference, it does not suffice to consider what democratic politics can and cannot do at a formal level - what is within its reach and what falls outside; to examine its substance and neglect its process. This involves a consideration of the effectiveness of the democratic process in ensuring that the exercise of public power, either directly or because of its role in mediating - defining, underpinning or enhancing - the exercise of power by one private individual against another, tracks the interests of those against whom power is exercised. We now turn to that task.

9.2 Democracy in the United Kingdom

When Lord Hailsham issued his rallying call to those who might join him in putting right the United Kingdom's constitution, he was clear that the incorporation of fundamental rights into the edifice was only one part of a solution to a constitutional malaise the roots of which lay "not in an excess of democracy but in too little."¹ There remain two obvious ways in which, post-Human Rights Act, this remains true. Neither is the focus of this chapter, though it is useful to summarise them, for reform of each would work to improve the extent to which the direct exercise of public power, and the 'delegation' of that power to private persons to use

¹ Lord Hailsham, *The Dilemma Of Democracy: Diagnosis And Prescription*, Collins (1978), at 226.

against others, would track the interests (and so render non-arbitrary) the interference with the interests of those against whom that power is exercised. In raising issues of democracy, that is, they inevitably raise issues of freedom.

9.2.1 The House of Lords

The introductory text to the Parliament Act 1911 references the reasons for its own enactment, amongst which is the fact that “it is intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis, but such substitution cannot be immediately brought into operation.”² It is in this sense that we are, to this day, living in an ‘interim constitution’³ whose twilight had seemed to be marked by the House of Lords Act 1998, and its removal of all but 92 of the hereditary peers from the upper chamber. The reform was never completed and several attempts to do so have failed.⁴ No attempt will, or should, succeed which does not alter the relationship between the two chambers: if the House of Lords is to be more democratically legitimate than the Commons - and if it is not, there should be no reform - then it should not be inferior to it. Equally, the need to make up for the potential loss of expertise in the Lords should be fulfilled by making the Lords a more formidable obstacle to the legislative process than it currently is. This would mean a clear understanding that the Salisbury-Addison convention did not apply as between the Commons and a reformed House of Lords⁵ and the repeal of the provisions of

² In *Jackson v Attorney General* [2005] UKHL 56, Baroness Hale claims, at [148], that the statement was included “[i]n deference to Sir Edward Grey,” who was Foreign Secretary at the time and had “something of an obsession” with turning the Lords into a ‘popular’ chamber: Vernon Bogdanor, *The Monarchy and the Constitution*, Clarendon Press (1997), at 123, citing, G.H.L. LeMay, *The Victorian Constitution*, Gerald Duckworth & Co (1979), at 214.

³ Bogdanor attributes the phrase to Asquith, citing an unpublished memo from Asquith’s papers in the British Library: Bogdanor, note 2, at 123

⁴ See, for example, The Royal Commission on the Reform of the House of Lords, *A House for the Future* (Cm 4534, 2000) and the resulting White Paper, *The House of Lords - Completing the Reform* (Cm 5291, 2001); Public Administration Select Committee, *The Second Chamber: Continuing the Reform* (2001-02, HC 494-I); Joint Committee on House of Lords Reform, *First Report*, (2003-03, HL Paper 17, HC 171), which set out seven options for a reformed Lords; Department for Constitutional Affairs, *Constitutional Reform: Next Steps for the House of Lords* (CP 14/03); HM Government, *The House of Lords: Reform* (Cm 7027, 2007), proposing free votes on a series of options, none of which attracted majority support in both Commons and Lords when the votes were held in March 2007; and, mostly recently, the *House of Lords Reform Draft Bill* (Cm 8077, 2011) which has since been abandoned. Generally, see Chris Ballinger, *The House of Lords 1911-2011: A Century of Non-Reform*, Hart Publishing (2012) and Peter Dorey and Alexandra Kelso (eds.), *House of Lords Reform Since 1911: Must the Lords Go?*, Palgrave Macmillan (2011).

⁵ The Salisbury-Addison convention derives from an agreement between the Leaders of the Labour and Conservative parties in the House of Lords following a general election in 1945 in which Labour had won a minor victory but anticipated difficulties in achieving its legislative agenda due to Conservative domination of the upper chamber.

the Parliament Acts which permit the Commons and Monarch, acting together, to legislate without the consent of the Lords.⁶

This would restore to the Lords the ability to do more than merely delay for up to one month Bills certified as Money Bills by the Speaker - a restriction which reflects long-standing convention, the failure of the Lords to adhere to which (through the rejection of the 'peoples' budget' of 1909) sparking the constitutional crisis which led to the enactment of the Parliament Act 1911. To accept this point leads naturally to the question of whether it would also be appropriate to rebalance the authority of Commons and Lords in matters of supply over and above that dealt with by the Parliament Acts; whether the Commons' financial privilege should be withdrawn from it. That privilege, which derives most obviously from resolutions of the House of 1671 and 1678⁷ means that a 'Money resolution' is required for any Bill that requires expenditure, while a 'Ways and Means resolution' is required for taxation: both are in the gift of the Commons, which must waive its privilege if the Lords are to amend a Bill which does either thing.⁸ The 17th century struggles between Crown and Parliament revolved in many ways around the question of who should be entitled to authorise taxation and were eventually resolved in Parliament's favour.⁹ It is logical and desirable that while the House of Lords remains an essentially aristocratic chamber, it has only a very limited role in taxation and expenditure, but were it reformed as a wholly democratic body, such rationale would cease to bite; were it reformed such that it was *more* democratic than the House of Commons, the Lords might become the best hope of promoting a more egalitarian distribution of property. A convention with its roots in centuries old constitutional struggle should not be permitted to obstruct that.

⁶ Parliament Act 1911, s.2, as amended by the Parliament Act 1949, s.1.

⁷ "That, in all Aids given to the King, by the Commons, the Rate or Tax ought not to be altered by the Lords," (resolution of the House of Commons, 16 April 1971); "That all Aids and Supplies, and Aids to his Majesty in Parliament, are the sole Gift of the Commons," (extract from a resolution of the House of Commons, 3 July 1678).

⁸ See Malcolm Jack et al (eds.), *Erskine May's Parliamentary Practice* (24th ed.), LexisNexis (2011), at 792-4; House of Lords Constitution Committee, *Money Bills and Commons Financial Privilege* (HL 2010-11, 97).

⁹ Some of the most famous instantiations of this quarrel resulted in *Darnell's Case* (1627) 3 St Tr 1 and *R.v Hampden* (1637) 3 St.Tr. 825, the former declaring the illegality of taxation (here, the granting of a forced loan) without Parliamentary approval, the latter upholding the legality of the Ship Money.

9.2.2 The electoral system

Similarly, if one is committed to ensuring that minority interests are protected, it is not clear why one should seek to employ legal mechanisms to limit a legislature whose democratic credentials remain suspect, rather than seeking to improve those credentials; why the solution to the problem of insufficient political accountability lies in the imposition of legal obstacles rather than the strengthening of those which are political. Regardless of how it might relate to a reformed House of Lords, the House of Commons continues to be populated according to a process which, in the name of strong government and clarity, distorts the input of electorate, consistently underrepresenting minority perspectives and working to cement a neo-liberal consensus in British politics even as social policies, at least where not in conflict with these economic considerations, have coalesced at the progressive end of the spectrum. A 1997 New Labour manifesto promise committed the party to a referendum on voting reform which never materialised. Instead, the Jenkins Commission,¹⁰ having been tasked with recommending a ‘broadly proportional’ system, argued for the alternative vote top-up system but did not see its proposals result in legislation. By 2010, the mood had shifted such that the Labour Party was willing to endorse a referendum on the alternative vote system (minus the top-up element), a commitment which also found its way into the coalition agreement between the Conservative and Liberal Democrat parties, even though the latter had in its manifesto indicated a preference for the single transferrable vote. The comprehensive defeat of the proposal in the May 2011 referendum makes any further attempt at reform in the near future unlikely, but as with Lords reform, it is possible that a solution in this area would promote the ends of freedom (whether defined in this project’s republican terms or those of non-interference) while maintaining the advantages of the political process over rights-based solutions. A neo-republican perspective, committed to the protection of freedom by ensuring that public power is exercised in a way which tracks the interests of those living under it, would be advised to start here.

¹⁰ Independent Commission on the Voting System, *The Report of the Independent Commission on the Voting System*, (Cm 4090, 1998)

9.3 Virtue and corruption

These two specific difficulties feed into the narrative advanced only indirectly; they are relevant to republican freedom without being central to the neo-republican project. More directly in keeping with our conclusion in part 2 regarding the manner in which the distribution of property grounds the possibility of horizontal domination is a consideration of the relationship of property to democratic politics. For that reason, we turn now to the role of money within the political process; more specifically, the potential of money to distort the democratic process which we have endorsed from within neo-republicanism for the specific reason that it permits the interferences which individuals undergo at the hands of public and private power to track those individuals' interests - to ensure that interferences take place on a non-arbitrary basis. Money's entry into the equation threatens to undermine this by bringing about a situation in which some interests are privileged over others and public power is put at the service of some (who possess property) against others (who do not). In examining the potential of money to distort politics, we thus progress the narrative of part 2: if the same iniquitous distribution which grounds horizontal domination also acts to prevent the democratic process from progressively unravelling that horizontal domination, then the problem is compounded and the existence of horizontal domination self-perpetuating. Like the two democratic failings already identified, then, we are dealing with a factor which speaks to the arbitrariness of the power exercised by public institutions, or put by them at the disposal of private individuals. Unlike these failings, however, this factor is similarly implicated in horizontal domination and so the issue becomes a neo-republican concern over and above any general fear for the quality and purity of democracy. We are again reminded of the point earlier insisted upon, whereby the liberal ideal of freedom as non-interference does not itself imply any particular demands regarding the configuration of our governing arrangements: one is no more likely to be free, in this sense, in any one type of polity than in any other. We here extend that logic - the distortion of the political process by money is, like the nature of that process, not per se liable to alter the extent of freedom enjoyed by those living under it. The same cannot be said of money within the neo-republican constitution, for it distorts the democratic process which prevents the exercise of public power from having a freedom-reducing nature. The role of money within politics is, like the issue of democracy itself, a question of freedom.

Significantly, however, in making this point, we also come full circle on the republican tradition, again encountering a context within which the unitary normative commitment of neo-republicanism ties it together with older republican themes such that they can once again become part of the programme though now in a better-defined and more clearly-reasoned fashion. The central idea here is the theme of (republican) virtue and, more obviously, its antithesis - corruption.

9.3.1 Virtue

Virtue is central to the republican project - though Pettit and Skinner have reconceptualised it as a tradition which derives its status as such from a particular conception of freedom, Blair Worden has claimed, instead, that it is “as a politics of virtue that republicanism most clearly defines itself.”¹¹ Virtue can be and, within the extended history of republicanism has been, understood in a variety of fashions, exemplifying the difficulties of coherence and definition which we earlier noted to have acted to undermine the instrumental utility of civic republican ideas. The concept’s roots are resolutely in the classical world,¹² though complicated in its status as a republican phenomenon by Machiavelli’s implicit, but insistent, differentiation of political and moral virtue which acknowledged that what was good for the polity was not always that which it was right or proper for the individual to pursue¹³ - moral virtue was distinct from political virtue and the Thomist assimilation of civic virtue with Christian morality was overcome.¹⁴ The American founding, whose Machiavellian roots, via the English republicans, we have already noted, was a project haunted by the need to achieve and

¹¹ Blair Worden, *Marchamont Nedham and the Beginnings of English Republicanism, 1649-1656*, in David Wootton (ed.), *Republicanism, Liberty and Commercial Society, 1649-1776*, Stanford University Press (1995), at 46.

¹² See, for example, Cicero, endorsing Plato in *De Officiis* I.85: “those who are about to take charge of public affairs should... fix their gaze so firmly on what is beneficial to citizens that whatever they do, they do with that in mind, forgetful of their own advantage... [they should] care for the whole body of the republic rather than protect one part and neglect the rest.”

¹³ For an overview of wildly divergent interpretations of Machiavelli’s thought, culminating in the claim that, for Machiavelli, “Public life has its own morality, to which Christian principles (or any absolute personal values) tend to be a gratuitous obstacle... it approves, or at least permits, the use of force where it is needed to promote the ends of political society”, see Isaiah Berlin, *The Originality of Machiavelli*, in his *Against The Current: Essays in the History of Ideas*, Pimlico (1997), at 66.

¹⁴ Machiavelli’s virtue (*virtù*) “may be broadly defined as that quality of energy, vitality and courage which enables man to achieve greatness and power in the face of the impersonal force of fortune” – Nicolai Rubinstein, *Italian Political Thought, 1450-1530*, in J. H. Burns and Mark Goldie (eds.), *The Cambridge History of Political Thought (1450-1700)*, Cambridge University Press (1994), at 45. As this definition suggests, central to the Machiavellian project is the understanding of how *virtù* interacts with those political forces outside of man’s control. See also, S. M. Shumer, *Machiavelli: Republican Politics and Its Corruption*, (1979) 7 Political Theory 5.

protect and encourage virtue, for fear of the collapse of the republic - a fear which required those who wrote the constitution to address head-on Montesquieu's assertions about the impossibility of ensuring virtue within a large republic.¹⁵ Madison devoted much energy to impeding the effects of factionalism, noting the complaint that "the public good is too often disregarded in the conflicts of rival parties... measures are too often decided, not according to the rules of justice and the rights of the minor party, but by the superior force of an interested and overbearing majority" but regarding the causes of factions as "sown in the nature of man" and so impossible to remove.¹⁶ Minority factions might be overcome through normal majoritarian politics. Where the faction comprised a majority, the democratic process might "enable it to sacrifice to its ruling passion both the public good and the rights of other citizens."¹⁷ Here Madison puts faith in the institutions of representative democracy - what he describes as a republic, in opposition to a democracy - to act as a "republican remedy for the diseases most incident to republican government."¹⁸ In this case, the large scale of the polity, which Montesquieu considered a disadvantage, is reconceived as a specific contributor to the protection of virtue:

"Extend the sphere [of the state] and you take in a greater variety of parties in interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength and to act in unison with each other."¹⁹

This same need to encourage virtue (in particular, to consider the method by which a common good other than the mere aggregate of divergent and competing private interests might become the subject of political action) has resonated through to the present day as a persistent counterpoint to the liberal characterisation of the self-interested rational calculator.²⁰ A specific focus upon virtue has, however, in recent times been central only to

¹⁵ See above, 1.2.2, and note 14 below it.

¹⁶ James Madison, Federalist no. 10, in James Madison, Alexander Hamilton and John Jay, *The Federalist Papers*, Penguin (1987), at 124-25.

¹⁷ Madison, note 16, at 125.

¹⁸ Madison, note 16, at 128.

¹⁹ Madison, note 16, at 127.

²⁰ See Michelman: "One possible way of making sense of this is by conceiving of politics as a process in which private-regarding 'men' become public-regarding citizens and thus members of a people. It would be by virtue

forms of republicanism which fall upon a divergent branch of the tradition from that which is the focus of the present work.²¹ In order to bring it back within the neo-republican project, we must be clear how we understand it, situating our neo-republican concern for virtue amongst themes such as the pursuit of glory on behalf of the republic; the pursuit of the public interest as opposed to private advantage and success in martial pursuits. In order to avoid the problems of definition associated with these civic republican ideas and to capture the broad overlap of these different senses, we can here define virtue in negative terms as the antithesis of self-interest appropriate to the exercise of public power; as the exercise of public power in a manner other than that calculated to procure private advantage, thereby siding with Cicero and Madison over Machiavelli.²² In formulating it negatively, we avoid the difficulties attracted by any definition based upon a discrete and unitary public interest. Whether or not such a thing exists, it remains undeniable that its substance is irreconcilably contested, and to make it the focus of virtue is to beg a number of questions.

9.3.2 Corruption in republican thought

As with virtue, there are many ways of conceptualising corruption within the neo-republican tradition. Many of its variants can be included under the umbrella of the exercise of power in pursuit of private interests to the exclusion of the public good - the *res publica*, or commonwealth which should be the focus of those wielding political power. The specific private interests which might be the illegitimate focus within this pejorative account, which would indicate that virtue had been squeezed out by corruption, can be framed broadly - power might be exercised to promote the interests of ethnic or religious groupings or even of a particular gender - but all of this is made less likely by a broad franchise. If it is not - if a majority is minded to tyrannise a minority even where that minority is properly represented within the democratic process - then it may indicate that the polity in question is not viable as a site of republican constitutionalism. This is a problem not of constitutionalism but of politics, which only an evolution in political attitudes can undo. Even in a democratic context,

of that people-making quality that the process would confer upon its law-like issue the character of law binding upon all as self-given." Frank Michelman, *Law's Republic*, (1988) 97 Yale Law Journal 1493, at 1502.

²¹ The clearest example, published in the same year as Pettit's most important work, is Richard Dagger, *Civic Virtues: Rights, Citizenship, and Republican Liberalism*, Oxford University Press (1997).

²² Defining virtue in this fashion makes clear why, as alluded to in chapter 1, the republican tradition came into tension with the rise of commerce, whose good function was and is thought to rely more or less entirely upon such self-interest.

however, in which an unimpeachable formal equality exists - where the electorate and their representatives are blind to the characteristics which have grounded discriminatory exercises of public power in the past - there remains the possibility that money will subvert the democratic process. Thus we match our understanding of corruption to that proposed for virtue, this latter having been defined in relation to the former. Where the corruption with which we concern ourselves concerns money, as here, we encounter another reason for identifying virtue and corruption in terms of the presence or absence of self-interest as a motivating factor - where an action is taken in return for direct financial gain, it becomes much easier to state with confidence that it is done in pursuit of self-interest; there is an objectivity to the diagnosis which excludes the possibility that what is being done represents nothing more than a good-faith disagreement as to what it is that the public interest requires. There is of course a valid distinction to be made between a direct financial inducement offered to a public official in order to have him or her act in a certain way and that same official acting in a way that is nevertheless of benefit to him or her. This latter cannot be counted amongst examples of corruption in the sense used here; to include it is to imply the existence of an objective public interest which is not that being pursued and to claim privileged access to a person's internal motivations. It is, furthermore, incompatible with the idea of and justification for democracy advanced herein. The corollary of this concession is that where a direct financial inducement is offered and accepted, the label of corruption can be applied whether or not the individual in question would have acted the way he or she did without said inducement. Corruption has no necessary connection to the adherence to, or failure to adhere to, the rules laid down. This, then, is the focus of our analysis, tying together our themes of property, domination and the virtue and corruption emphasised by older incarnations of republican thought, the role of money in the political process and the possibility that it is used to motivate some to act to promote their own interest and so undermine the neo-republican justification of democracy as a guarantor of (neo-republican) freedom.

9.3.3 The irrelevance of the psychological

Against this background understanding of virtue and corruption, we see that Madison's remarks on human nature, quoted above, encapsulate an important idea about the psychological presuppositions of political thought. Perspectives on human freedom are

invariably strongly influenced by instincts, often unspoken, as to human nature - we have seen this in Hobbes' state of nature device, which is used by him to demonstrate, given man's natural dispositions, the incompatibility of freedom with security. Though Hobbes would seem to overstate the case, in reconceptualising the hypothetical state of nature as a state not of freedom but of pure horizontal unfreedom we might seem to have accepted the fundamentals of his argument and the consequent belief that at least some individuals would be liable to prey upon others in the absence of an institutional set-up which prevented them from doing so. This broad perspective is mirrored elsewhere in the tradition, which "has always taken a pessimistic view of the corruptibility of human beings in positions of power"²³ - evidenced, Pettit notes, by certain dicta of Machiavelli:

"it is necessary for anyone who organizes a republic and establishes laws in it to take for granted that all men are evil and that they will always act according to the wickedness of their nature, whenever they have the opportunity."²⁴

But in our response to Machiavelli on corruptibility, as in our response to Hobbes on security, the distinctiveness of the neo-republican conception of freedom becomes crucial here. The fact that freedom is reduced when one has the capacity to arbitrarily interfere with the interests of another whether or not that interference takes place means that even if one rejects this pessimism - if one believes that individuals in the state of nature would not likely pose a physical threat to one another; that individuals holding political power would probably not abuse it - there is nevertheless an obligation to put in place the apparatus which would prevent it. What matters is whether or not the unwelcome event or events could take place - not whether they would in fact take place. Our psychological intuitions are of no consequence. We must guard against the corruption of the political process *even if* we have no reason to believe the individuals who feature within it have any propensity to corruption. This is not, of course, to say that we can ever hope to exclude absolutely such corruption. As in our earlier discussion about how the existence of public power can be justified in terms of the horizontal domination does not mean that in its presence no arbitrary interference will take place - a need for reform arises when the necessary rules do not exist or are not enforced, not merely because some will, inevitably, break them anyway - so too here: the point is not to make sure

²³ Philip Pettit, *Republicanism: A Theory of Freedom and Government*, Oxford University Press (1997), at 210.

²⁴ Pettit, note 23, at 210.

that there is no corruption within the political process, but to make such that what corruption takes place involves breaking the rules which exist in order to prevent it. Where it does not involve breaking the rules, the potential exists for the democratic process to be subverted by self-interest, thereby calling into question the freedom of those who live under it. Having clarified this, we have in place the groundwork necessary to assess the adequacy of the rules relating to money's place in democratic politics in the United Kingdom.

9.4 MPs and money

Wealth is, then, the factor which, as well as grounding much horizontal domination, most directly threatens the proper conduct of the democratic process. The insidious effect of money on democracy does not begin or end at the level of the party - the party's income and expenditure is of course relevant, and to the extent that it dictates, or attempts to dictate,²⁵ policy to its candidates and Parliamentary members, questions of its financial arrangements are an obvious focus of attention. The law on party income and expenses has been the subject of frequent amendment in recent decades. To the constituency-centred expenditure limits on candidates²⁶ and third parties²⁷ found in the Representation of the People Act 1983 have been added a series of nationally determined limits by the Political Parties, Elections and Referendums Act 2000 (PPERA), with limits similarly imposed on both political parties and third parties.²⁸ PPERA also established the Electoral Commission,²⁹ with which political parties must be registered in order to field candidates at all major elections.³⁰ Key office holders must be registered with the Commission,³¹ and it must supply a scheme for its financial structure for the Commission's approval.³² The Treasurer of the party is obliged to

²⁵ A commonplace of political discourse as indulged in by lawyers and judges particularly sees party discipline as dominating the political process, and thereby undermining the political process of accountability on which the so-called 'Westminster model' of governance is based, encapsulated in Lord Steyn's ominous invocation of a 'complaisant House of Commons' in *Jackson v Attorney General* [2005] UKHL 56, at [102]. Empirical work, however, strongly disputes the accuracy of this narrative (see, e.g., Philip Cowley, *Revolts and Rebellions: Parliamentary Voting Under Blair*, Politico's (2002), and his *The Rebels: How Blair Misled His Majority*, Politico's (2005)). See also Adam Tomkins, *Our Republican Constitution*, Hart (2005), at 136-139, and Danny Nicol, *Professor Tomkins' House of Mavericks*, [2006] Public Law 467.

²⁶ Representation of the People Act 1983 (ROPA 1983), s.76, as amended.

²⁷ ROPA 1983, s.75, as amended.

²⁸ Political Parties, Elections and Referendums Act 2000 (PPERA), parts V and VI respectively.

²⁹ PPERA, s.1.

³⁰ PPERA, s.22.

³¹ PPERA, s.24.

³² PPERA, s.26.

submit quarterly reports of donations made to the party,³³ as well as an annual statement of accounts.³⁴ The act also places restriction on who may make such donations: individuals are required to be on the electoral register and companies must be registered under the companies Act and incorporated in a member state of the European Union.³⁵ These rules can be understood as preventing a situation whereby certain interests are promoted in a manner which distorts the democratic process; even where actors are permitted to seek influence via the insertion of money into the process, a scheme of transparency means that it does so in a manner of which the public has means to know. The possibility of the exercise of public power tracking not the interests of the electorate but of a property-holding subset thereof is thus circumscribed, though not wholly excluded.

PPERA's reforms have already been demonstrated insufficient. Most notably, the 'cash for Honours' scandal, which saw a number of individuals who had previously made high-value loans to the Labour Party nominated for peerages, lead to the amendment of the rules on the making of loans to political parties so as to close the loophole which meant that loans at a commercial rate, did not have to be declared.³⁶ Parties' on-going and ever-increasing need for funds suggests that they will continue to push the boundaries set by law as far as possible. A move to public-funding, perhaps in return for a cap on donations, has been suggested as a solution.³⁷ In all of this, the role of trade union affiliation fees remains controversial, and the most likely stumbling block for reform,³⁸ with those who do not rely upon them attempting to have them treated in law as equivalent to private donations by individuals and corporations and those who do arguing that there exists a qualitative difference which justifies differential legal treatment. On the basis of the account offered earlier, a neo-republican analysis would support such a differential treatment, in recognition of the fact that individuals who are disadvantaged by their relative lack of wealth should be able, where necessary, to act in concert to attempt to redress the imbalance which exists in relation to those who own property: funding by trade unions promotes rather than inhibits the exercise of power in the

³³ PPERA, s.62.

³⁴ PPERA, s.42.

³⁵ PPERA, s.54.

³⁶ Part 4A of the 2000 Act, inserted by s.61 of the Electoral Administration Act 2006.

³⁷ See, e.g., The Committee on Standards in Public Life, *Political Party Finance: Ending the Big Donor Culture*, (Cm 8208, 2011) at 12, recommending a cap of £10,000 per donor per year.

³⁸ Committee on Standards in Public Life, note 23, at 12, recommending the payment of trade union affiliation fees be subject to the standard £10,000 cap, unless the unions chose to move to an opt-in system for trade union, with fees paid to any political party representing the number of members who had opted in, and not being capable of being held back for any reason.

interests of those who are horizontally dominated. In sum, considered at the party level, the role of money in politics - both receipts and expenditure - is heavily regulated, and is the subject of considerable journalistic interest. This is not to say that we should not seek to reduce further the role of money in the process - we should, as far as practicably possible, for the very possibility of it being used to prevent the exercise of public power from tracking the interests of those against whom that power is exercised is, we have seen, enough to render those who do not have money unfree in relation to those who do - but that the role of money here is not yet so damaging as to justify the belief that party finance reform is the solution to the endemic problems of the political process, as has recently been argued in the American context.³⁹

9.4.1 Money and individuals

At the level of the individual politician, attention has been focused in particular on the acquisition of public funds through illegal or immoral means - a corruption whose sole beneficiary is the individual himself, not directly calculated to distort the democratic process and so not necessarily sufficient to undermine the neo-republican justification of democracy. Most prominently, the expenses scandal of 2009 marked a new low point in public opinion of Parliament and Parliamentarians in recent decades.⁴⁰ The combination of the widespread abuse of allowances and expenses, the brazenness of some of the claims made and the fact that the misuse of funds served no purpose other than the enrichment of MPs (and occasionally members of their families)⁴¹ provoked backlash which saw many MPs lose their seats at the 2010 election, others imprisoned,⁴² and precipitated a hurried overhaul of a failing system into another that has not demonstrated the sort of durability that one would expect from well-designed reform.⁴³ Responses to the affair indicated that the public in general considered it both more outrageous than equivalent scandals where the aim was to raise funds for the party, and as justifying their cynical view of politics.

³⁹ Lawrence Lessig, *Republic, Lost: How Money Corrupts Congress - and a Plan to Stop It*, Twelve (2011).

⁴⁰ See Alexandra Kelso, *Parliament on its Knees: MPs Expenses and the Crisis of Transparency at Westminster*, (2009) *Political Quarterly* 329.

⁴¹ Though the most prominent case of such intra-familial generosity predated the main expenses scandal: see Committee on Standards and Privileges, *Conduct of Mr Derek Conway*, (HC 2007-08, 280) on the conduct of Derek Conway.

⁴² Those convicted included four MPs (David Chaytor, Eric Illsley, Elliot Morley, Jim Devine) and two peers (Lord Taylor of Warwick and Paul White, Baron Hanningfield).

⁴³ The reform was effected by the Parliamentary Standards Act 2009, itself significantly amended by the Constitutional Reform and Governance Act 2010.

It is difficult to reconcile the level of public anger that the expenses scandal attracted with the relative lack of concern for the more general and on-going enrichment of MPs from other, private, sources. The theme of this thesis is that, measured by their breadth, the most important relationships of unfreedom encountered by the average private individual are not those in which he or she stands before the state, but rather his or her private relationships. Those private relationships, and so the freedom of any one individual in relation to any other, are structured by private law, which is itself the product of constitutional - most importantly political - processes. The democratic aspect of the constitution derives its importance, in this view, from its centrality to the question of how private power, and so human freedom will be distributed: it is the outcome of democratic decision-making which determines when, and under what circumstances, the State's coercive apparatus will be deployed. Public law is the midwife of private law, which is itself in large part determinative of the extent of individual freedom. Enrichment from private sources, like enrichment from public funds, indicative of action motivated by self-interest (and so falls on the wrong side of the virtue/corruption divide we have identified), but due to the possibility that the public power being exercised is thereby not merely neglected but in fact distorted, corruption of the former sort is freedom-reducing in a way that the latter, which attracts greater public opprobrium, is not.

9.4.2 Relevant offences

The identity of the specific offences for which MPs might be liable if acting corruptly was for many years a source of some considerable confusion. Though misbehaviour in or misuse of a public office is an offence at common law,⁴⁴ MPs are (probably) not holders of public office and so not subject to it.⁴⁵ Though use is still made of the offence, a former Director of Public

⁴⁴ The elements of the offence are restated in Attorney General's Reference (No.3 of 2003) [2004] EWCA Crim 868.

⁴⁵ E.g., the report of the Royal Commission on Standards of Conduct in Public Life in 1976 stated that "nor does membership of Parliament, as such, constitute public office for the purposes of the common law." (Cmnd 6524, 1976), at [307]. Zellick disagrees with what he describes as the 'virtual unanimity' in this belief: see Graham Zellick, *Bribery of Members of Parliament and the Criminal Law*, [1979] Public Law 31 at 32 and 34-40. See also Dawn Oliver, *Regulating the Conduct of MPs. The British Experience of Corruption*, (1997) 45 Political Studies 539, at 541. Oliver quotes from the unreported 1992 case *R v Currie, Jurasek, Brooks, Greenway and Plasser Railway Machinery (GB) Ltd*. The judgement of the court can now be found in A.W. Bradley, *Parliamentary Privilege and the Law of Corruption*, [1998] Public Law 356. The judge directed the jury to reach a not guilty verdict in relation to some defendants, while no evidence was offered against the Member, who was therefore also acquitted.

Prosecutions described it as having been “dredged up from the Middle Ages.”⁴⁶ Despite their being front and centre in terms of public visibility, as well as amongst those public officials whose wrongdoing could do most damage to public and private interests alike, the common law could not cope with a crooked MP with the same deftness with which it routinely deals with a corrupt policeman. This is problematic - even though an MP is one legislator amongst hundreds, the potential reach of his or her corruption, via legislation of general application and semi-permanent duration, is far greater than that of the average public servant.

Compounding this, it was unclear if the House of Commons was a public body for the purposes of the Public Bodies Corrupt Practices Act 1889 and if MPs were ‘agents’ for the purposes of the Prevention of Corruption Act 1906.⁴⁷ Only more specific offences, such as the Honours (Prevention of Abuses) Act 1925, enacted following a Royal Commission Report into the sale of Honours by Lloyd George, which makes it an offence to sell “the grant of a dignity or title of honour to any person,” were unambiguous in their application to certain forms of corruption. Even that, it has been suggested, “simply regularized the practice” to which it was supposed to put an end.⁴⁸ To date, the only conviction under the 1925 Act has been that of Lloyd George’s ‘fixer’ Maundy Gregory in 1933; prosecutions were considered but not brought in relation to the 2005 ‘cash for Honours’ affair.⁴⁹ Given that the granting of honours is not particularly central to the exercise or distribution of public power and even the loans for peerages scandal, which implicated the exercise of legislative functions via the right to a seat in the House of Lords, does so only minimally, it is to be regretted that it is the focus of the clearest legislative attempt to prevent corruption. The symbolism of this focus upon the superficial is important.

⁴⁶ Quoted in the Report of the Joint Committee on the Draft Corruption Bill (2002-2003, HL 157, HC 705), at [45].

⁴⁷ See, e.g., Jacob Rowbottom, *Democracy Distorted*, Cambridge University Press (2010), at 84, and Law Commission, *Reforming Bribery* (Law Com No 313, 2008), at 67, note 20.

⁴⁸ Alan Doig, *Political Corruption in the United Kingdom*, in Martin Bull and James Newell (Eds.), *Corruption in Contemporary Politics*, Palgrave Macmillan (2003), at 178.

⁴⁹ For further detail on the Gregory case, see Committee on Standards in Public Life, *The Funding of Political Parties*, (Cm 4057, 1998), chapter 14. Lloyd George sold “twenty-six peerages, 130 baronetcies, 481 knighthoods and over 25,000 OBEs until the racket finally crumbled on the award of honours... to a convicted food hoarder, a war-time profiteer, a crook, a ‘technical’ traitor, and a tax-evader.” Alan Doig, *Westminster Babylon: Sex, Money and Scandal in British Politics*, Allison & Busby (1990), at 41.

9.4.3 The Bribery Act 2010

Though the criminal law's attention has long been focused elsewhere, the previous situation of unacceptable uncertainty with regards to the relevant offences no longer prevails. Many of the various statutory and common law offences of bribery were replaced by a consolidated Bribery Act 2010, which repealed, *inter alia*, the Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Act 1906.⁵⁰ The Bribery Act applies explicitly to those "in public service of the Crown."⁵¹ From the perspective of those receiving a bribe, an offence is committed if a person:

- "agrees to receive or accepts a financial or other advantage intending that, in consequence, a relevant function or activity should be performed improperly" whether by himself or another;⁵²
- "requests, agrees to receive or accepts a financial or other advantage," and "the request, agreement or acceptance itself constitutes the improper performance" by that person of a relevant function or activity;⁵³
- "requests, agrees to receive or accepts a financial or other advantage as a reward for the improper performance" (whether by that person or another) of a relevant function or activity;⁵⁴
- in anticipation of or in consequence of "requesting, agreeing to receive or accepting a financial or other advantage, a relevant function or activity is

⁵⁰ The Nolan Commission suggested in 1995 that the Law Commission should examine the law on bribery. It did so, and published proposals for reform in a 1998 paper (*Legislating the Criminal Code: Corruption*, (Law Com No 248, 1998)). A white paper based on those proposals (Home Office, *Raising Standards and Upholding Integrity: the Prevention of Corruption*, (Cm 4759, 2000)) preceded the publication of draft legislation (Home Office, *Corruption Draft Legislation* (Cm 5777, 2003)), which was the subject of a critical Joint Committee report (*Joint Committee on the Draft Corruption Bill: Report and Evidence* (2002-03), HL 157, HC 705). Following a consultation exercise, the project was returned to the Law Commission, which published its report *Reforming Bribery* (Law Com No. 313, 2008) several years later.

⁵¹ Bribery Act 2010, s.16

⁵² s.2(3).

⁵³ s.2(4).

⁵⁴ s.2(5).

performed improperly” by that person or by another person at the first persons’ request or with his assent or acquiescence.⁵⁵

A ‘relevant function’ includes “a function of a public nature” alongside those connected to businesses, those performed in the course of one’s employment and those performed on behalf of a body of persons,⁵⁶ provided it also meets one of three conditions: that it is expected to be performed in good faith, or impartially, or that by virtue of performing it, the person who does so is in a position of trust.⁵⁷ The expectation test is objective: it is “a test of what a reasonable person in the United Kingdom would expect in relation to the performance of the type of function or activity concerned.”⁵⁸ A relevant function or activity which is so by virtue of the expectation that it be performed in good faith or impartially is performed improperly if that expectation is not met in the performance of the activity, or if it is not performed at all and such failure is a breach of the expectation of good faith or impartiality.⁵⁹ If we take the core case of a bribe in a Parliamentary context, where an MP is given a cash sum in order to make a certain speech in the course of a debate, or vote in a particular fashion in a division, it seems clear that it would be caught by the Bribery Act 2010, according to the following process of reasoning: an MP is performing a relevant function - one of a public nature, regarding which there is an expectation that it be performed in good faith - in contributing to debates and voting in the House. If he or she accepts a bribe (a ‘financial advantage’) in anticipation of performing that function improperly, in this case meaning not in good faith - so perhaps in accordance with the briber’s instructions, rather than the MP’s own conscience or understanding of the public good - then the fourth offence outlined above has been committed. If the neo-republican focus on excluding the arbitrary exercise of public power requires legal rules which prohibit outright bribery - the most obvious manner by which the exercise of power might become arbitrary - we seem now to have, just about, arrived at the necessary point, at least in term of the rules which exist in law.

⁵⁵ s.2(6).

⁵⁶ s.3 (1) and 3 (2). The explanatory notes of the Act associate the phrase ‘function of a public nature’ with that in s.6 of the Human Rights Act 1998. For its interpretation, see *YL v Birmingham City Council* [2007] UKHL 27.

⁵⁷ s.3.(1) and 3 (3)-(5).

⁵⁸ s.5(1).

⁵⁹ s.4(1).

9.5 Parliamentary privilege and the criminal law

The long-standing lack of clarity which predated the enactment of the Bribery Act was not restricted to the question of what offences might apply: similar confusion existed as to the possibility of prosecuting offences related to their Parliamentary role, in relation to which certain immunities have long existed under the general heading of Parliamentary privilege. The relevant immunity is not general. MPs have no general privilege of freedom from arrest that will be permitted to prevent the administration of justice⁶⁰ nor a general immunity from either criminal or civil prosecution.⁶¹ Previously, they enjoyed immunity from being impleaded, meaning that no civil action could be raised against them, but by means of a series of four statutes, beginning with the Privilege of Parliament Act 1700 and ending with the Parliamentary Privilege Act 1770, this privilege was truncated and finally abolished.⁶² Left intact was the privilege of immunity from civil arrest during sittings of Parliament and for forty days either side, but such immunity was reduced to a state of minimal importance following the abolition of imprisonment for debt by the Debtors Act 1869.

Notwithstanding the absence of any sort of general immunity, the privileges of Parliament are such that doubts have been expressed as to possibility of prosecuting MPs for offences which relate to their duties. Some of these were dispelled by the decision of the Supreme Court in *R v Chaytor*.⁶³ Therein, two claims were advanced as to the existence of a parliamentary privilege which would exclude the jurisdiction of the Crown Court to try three MPs for charges of theft by false accounting arising out of the 2009 expenses scandal. The first of these was that to permit jurisdiction would violate article 9 of the Bill of Rights 1689, which provides that the “Freedom of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament”⁶⁴; the second that an

⁶⁰ Erskine May, note 8, at 245.

⁶¹ Erskine May, note 8, at 245-9.

⁶² The interpretation of the 1770 Act was the subject of a reference by the Queen to the Judicial Committee of the Privy Council under s.4 of the Judicial Committee Act 1833. The reference was made at the request of the House in keeping with a recommendation made by the Committee of Privileges in a 1957 report. The Judicial Committee answered the question referred - whether the House would be acting contrary to the 1770 Act if it treated the issuing of a writ against an MP in respect of a speech of his in Parliament as a breach of its privilege - negatively: *Re Parliamentary Privilege Act, 1770* [1958] A.C. 331. The circumstances are discussed in S. A. de Smith, *Parliamentary Privilege and the Bill of Rights*, (1958) *Modern Law Review* 465.

⁶³ [2010] UKSC 52. For the prior expression of such doubts see, e.g., Rowbottom, note 47, at 84.

⁶⁴ The ‘cash for questions’ affair, discussed below, had as one of its stranger consequences the enactment of a statutory rule which permits someone whose actions would otherwise be covered by privilege to waive that

older privilege of Parliament - its “exclusive cognisance” - gives each House sole jurisdiction to manage and resolve its own affairs, even though it has been clear for many centuries that the Commons has no power to try a criminal offence.⁶⁵ The jurisdiction of the ordinary courts to rule on the existence and extent of Parliament’s privilege is well-established.⁶⁶

In *Chaytor*, a panel of nine judges in the Supreme Court unanimously rejected both claims to privilege and confirmed the jurisdiction of the Crown Court over the conduct alleged. Lord Phillips noted that though privilege is absolute,⁶⁷ there exist sound policy reasons for giving it a narrow scope and it should not be interpreted so as to exclude the possibility of the House referring to the police criminal offences potentially committed in relation to the conduct of administration in Parliament.⁶⁸ Lord Rodger held that the issue was reducible to the question of whether the alleged offences were an example of “ordinary crimes”⁶⁹ and concluded that they were indeed, for there was “nothing in the allegations against the appellants which relates in any way to the legislative or deliberative processes of the House of Commons or of its Members, however widely construed.”⁷⁰ Significant, but not dispositive, was the fact that the House had not itself sought to assert its privilege in this case, but had instead cooperated with the authorities.⁷¹ The Parliamentary Standards Act 2009, enacted following the expenses scandal, deals with the issue by providing that “[n]othing in this Act shall be construed by any court in the United Kingdom as affecting Article IX of the Bill of Rights 1689.”⁷² The decision in *Chaytor* would therefore seem to go some way to ensuring that not only are the tools necessary to exclude corruption in place, but that their application is not thwarted by the legitimate constitutional need to protect the legislature from the interference of the courts.

privilege for the purposes of a defamation action: Defamation Act 1996, s.13. The rule was enacted to permit Neil Hamilton MP to pursue his ill-fated libel action against the *Guardian* newspaper.

⁶⁵ Erskine May, note 8, at 227-31.

⁶⁶ Most famously, *Stockdale v Hansard* (1839) 9 Ad & El 1, in which Parliamentary privilege was asserted to protect the publication by of supposedly defamatory material to the public, on the basis that its circulation amongst members of Parliament would be privileged (*Lake v King* (1667) 1 Saunders 131). The court rejected the claim and confirmed the jurisdiction of the court to rule on the extent of privilege. Parliament responded by enacting the Parliamentary Papers Act 1840, which provides absolute privilege from criminal and civil liability to material published on the order of Parliament, as well as qualified privilege to the publication of material extracted therefrom.

⁶⁷ [2010] UKSC 52, at [61].

⁶⁸ [2010] UKSC 52, at [61] and [90].

⁶⁹ [2010] UKSC 52, at [118].

⁷⁰ [2010] UKSC 52, at [122].

⁷¹ [2010] UKSC 52, at [123].

⁷² Parliamentary Standards Act 2009, s.1.

9.5.1 Bribery and the decision in Chaytor

Rather unfortunately, however, the applicability of the decision in Chaytor to any potential bribery prosecution under the 2010 Act is not self-evident. That there remains doubt on this point is a function of the tortured process of legislative reform in this area. The long gestation of the Bribery Act saw the question of bribery's relationship to privilege considered at many points. In 1999, the Joint Committee on Parliamentary Privilege recommended that “[m]embers of both Houses should be brought within the criminal law of bribery by legislation containing a provision to the effect that evidence relating to an offence committed or alleged to be committed under the relevant sections shall be admissible notwithstanding article 9 [of the Bill of Rights].”⁷³ The significance of such a change was downplayed, as “there will be few prosecutions of members, because we believe there are few instances of corruption of members... [and] in only a small proportion of any prosecutions will it be necessary to question proceedings in Parliament.”⁷⁴ The former point demonstrates a certain complacency, perhaps encouraged by the difficulty of identifying an offense which clearly applied to such corruption. If so, it is useful to underline once more that the need for clearly applicable, enforceable, law is independent of whether actual corruption is assumed to, or does, exist.

A clause to a similar effect contained in draft legislation in 2003 was criticised by a Joint Committee report, which accepted the necessity of clarifying the relationship between privilege and bribery but not the form in which it was proposed to do so.⁷⁵ The bill was, however, abandoned and the matter left unresolved. When the project returned to the House in the form of the draft Bribery Bill in 2008, included was a clause which would have made “the word or conduct of an MP or peer admissible in proceedings for a bribery offence under the Bill where the MP or peer is a defendant or co-defendant notwithstanding any enactment or rule of law including Article 9 of the Bill of Rights 1689.”⁷⁶ A Joint Committee report noted, however, that the Parliamentary Standards Bill (now the Parliamentary Standards Act 2009) which was proceeding through Parliament contemporaneously contained a clause relating to privilege which dealt with the same issue in a different manner and that, given the

⁷³ Joint Committee on Parliamentary Privilege (1998-1999, HL 43-I, HC 214-I), at [167].

⁷⁴ *ibid*, at [168].

⁷⁵ Joint Committee on the Draft Corruption Bill, (2003-2003, HL 157, HC 705), at [133-135].

⁷⁶ Explanatory notes to the Bribery Bill, 2008.

importance of the issue, a piecemeal reform was not acceptable.⁷⁷ It therefore reaffirmed the conclusion of the Joint Committee on Parliamentary Privilege in 1999 that specific legislation should be brought forward to confirm the scope of the privilege.⁷⁸ The clause in the Parliamentary Standards Bill did not make it into law, and given what has followed, it is unfortunate that the decision was taken to exclude the clarification from the 2010 Act.

A Bill reforming and clarifying the privilege was promised in the Queen's Speech in 2010 and a Green paper published in April 2012, as much because of concerns about Member's statements in the House breaching so-called super-injunctions as because of privilege's contribution to the difficulty of prosecuting MPs.⁷⁹ The Green Paper consists of draft clauses rather than an entire Bill, but one of the clauses provides that:

“No enactment or rule of law preventing the freedom of speech and debates or proceedings in Parliament being impeached or questioned in any court or place out of Parliament is to prevent any evidence being admissible in proceedings for an offence.”⁸⁰

In light of the fact that, applied generally, such a clause would undo undermine article 9, a draft schedule contained a list of offences to which the clause would not apply, amongst which is misconduct in a public office.⁸¹ The offence is excluded because of its uncertain scope, which might permit police to substitute it for one of the other excluded offences and so subvert the will of Parliament, which would be particularly undesirable given that the offence attracts a maximum sentence of life imprisonment.⁸² Following the invocation of misconduct in a public office as part of the Damian Green affair,⁸³ the Committee on Issues of Privilege recommended that the Law Commission be asked to revisit the offence - it had previously

⁷⁷ Joint Committee on the Draft Bribery Bill, (2008-2009, HL 115-I, HC 430-I), at [224]-[225]

⁷⁸ *ibid*, at [208] - [228].

⁷⁹ HM Government, *Parliamentary Privilege*, (Cm 8318, 2012)

⁸⁰ *ibid*, at 37.

⁸¹ *ibid*, at 39.

⁸² *ibid*, at [132]-[135].

⁸³ Charges of misconduct in a public office were considered, but never brought, against a Home Office official who had leaked departmental papers to Damian Green MP, (and Green himself), who was arrested in Parliament for aiding, abetting, counselling or procuring misconduct in public office and had his parliamentary office searched by police, with the consent of the Speaker who wrongly assumed that police had acquired a warrant to do so.

recommended that the offence be put on a statutory footing.⁸⁴ The Law Commission is due to report in 2016.⁸⁵ Bribery under the 2010 Act is not excluded from the scope of the clause.

The consultation started by the Green Paper closed on 30 September 2012 and it is to be hoped that reform follows imminently. In the meantime, the House of Lords has called for the appointment of a Joint Committee,⁸⁶ and the Commons has agreed.⁸⁷ The Joint Committee is to report on 25th of April 2013. Until an explicit statement of the limits on privilege is enacted, however, we are left in a deeply unsatisfactory state of flux. Much of the old law was swept away by the Bribery Act 2010, which provides clarity as to the nature of the applicable offences which was previously lacking; clarity which co-exists with uncertainty about its relationship with privilege, the question being whether or not it is possible to carry out a persecution for bribery of an MP under the 2010 Act without moving from an Article 9 compliant trial (as in *Chaytor*) to one which, in the words of Lord Rodger requires an investigation into what he described as the “legislative or deliberative processes of the House of Commons.”⁸⁸ Given that the lack of any relation between the offences in *Chaytor* and these processes was central to the decision that the privilege did not apply, it seems likely that a bribery prosecution would be held by the courts to avoid a violation of privilege only if it could similarly be executed without reference to (more specifically, without ‘calling into question’) proceedings in Parliament.

9.5.2 Proceedings in Parliament

The question therefore arises of how to understand the term ‘proceeding in Parliament’ as used in Article 9 of the Bill of Rights. Its primary meaning, Erskine May suggests, is “some formal action, usually a decision, taken by the House in its collective capacity,”⁸⁹ while a Member takes part in proceedings “usually by speech, but also by various recognized forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee, most of such actions being time-saving substitutes for speaking.”⁹⁰ Not

⁸⁴ Committee on Issue of Privilege, *Police Searches on the Parliamentary Estate*, (2009-2010, HC 62), at [57].

⁸⁵ See: <http://lawcommission.justice.gov.uk/areas/misconduct.htm>

⁸⁶ HL Deb, 28 May 2012, vol 737, col 971.

⁸⁷ HC Deb, 3 December 2012, vol 554, col 695.

⁸⁸ [2010] UKSC 52, at [122].

⁸⁹ Erskine May, note 8, at 235.

⁹⁰ Erskine May, note 8, at 236.

everything done in Parliament is a ‘proceeding in Parliament,’ though Parliament itself has taken a wide view of the matter: a 1939 Select Committee held it to include “everything said or done by a member in the exercise of his functions as a member in a committee of either House, as well as everything said or done in either House in the transaction of parliamentary business.”⁹¹ Further, “cases may be easily imagined of communications between one Member and another or between a Member and a minister so closely related to some matter pending in or expected to be brought before the House that, although they do not take place in the Chamber or a committee room, they form part of the business of the House.”⁹² The decision of the Committee of Privileges in 1957 that this definition was correct and therefore a letter written by an MP to a Minister criticising the administration of a nationalised industry was rejected by the House and described by de Smith as an “essay in liberal interpretation.”⁹³ The showing of a film in Parliament was considered by the Committee of Privileges to not constitute a proceeding in Parliament.⁹⁴ Various committees have recommended statutory clarification of the question.⁹⁵ The most recent, prior to the current attempt, was that of the Joint Committee on Parliamentary Privilege in 1999, which recommended legislation based upon the Australian Parliamentary Privileges Act 1987.

Until legislation is introduced, the question is one of statutory interpretation and so the province of the courts⁹⁶ (paying careful attention, however, to what is said on the matter by Parliament)⁹⁷ who have considered the matter at various points.⁹⁸ In *Chaytor*, Lord Rodger, reviewing the authorities, concluded that the activity at issue there, the submission of claims for expenses did “not form part of, nor is it incidental to, the core or essential business of Parliament, which consists of collective deliberation and decision making,” and is therefore “an incident of the administration of Parliament; it is not part of the proceedings in Parliament.”⁹⁹ The same cannot be said, however, of what we have described as a core case of bribery which would certainly be caught by the 2010 Act: where an MP accepts a bribe

⁹¹ Quoted in Joint Committee on Parliamentary Privilege, (1998-1999, HL 43-I, HC 214-I), at [99].

⁹² Quoted in Erskine May, note 8, at 236.

⁹³ de Smith, note 62, at 480.

⁹⁴ Committee of Privileges (1986-87, HC 365), at [17].

⁹⁵ Among them the Commons Select Committee on Parliamentary Privilege in 1967; the Joint Committee on Publication of Proceedings in Parliament in 1970; and the Commons Committee of Privileges in 1977.

⁹⁶ A position accepted by the Clerk of the Parliaments in a letter cited by Lord Phillips in *R v Chaytor*, [2010] UKSC 52, at [15].

⁹⁷ *R v Chaytor*, [2010] UKSC 52, per Lord Phillips at [16].

⁹⁸ E.g., *Stockdale v Hansard* (1839) 9 Ad & El 1.

⁹⁹ *R v Chaytor*, [2010] UKSC 52, per Lord Rodger at [62].

and in consequence votes for a certain result - a vote in Parliament will surely be part of its “collective deliberation and decision making.”

A way round this impasse is offered by remarks made when this question was considered as a prelude to the trial of Harry Greenway MP for common law bribery. Buckley J suggested that it would be possible to prove the charge without reference to proceedings in Parliament, for the corrupt act is complete when the bribe is taken:

“If, as is alleged here, a bribe is given and taken by a member of Parliament, to use his position dishonestly... the crime is complete. It owes nothing to any speech, debate or proceedings in Parliament. Proof of the element of corruption in the transaction is another and quite separate consideration. Privilege might well prevent any inquiry by a court into Parliamentary debates or proceedings. However, it is not a necessary ingredient of the crime that the bribe worked. A jury will usually be asked to infer corruption from the nature of and circumstances in which the gift was given. I cannot see that Article 9 in any way prevents that.”¹⁰⁰

Though that trial collapsed and any prosecution now would be under the 2010 Act these dicta point the way forward for prosecution of the offence, outlined above, of accepting a bribe. Three of the four offences established in s.2 of the Act relate to the ‘requesting, agreeing to receive or accepting’ of a financial or other advantage - if this is done under the conditions laid down, it is not necessary to demonstrate that the ‘relevant function or activity’ is indeed improperly performed.¹⁰¹ It seems the best understanding is that prosecutions of these specific offences will be possible without contravening the Bill of Rights. Only the fourth offence defines the offence in terms of the relevant function or activity having been, in actual fact, performed improperly. Only under that provision would the prosecution of an MP require evidence to be led as to his or her conduct. If that conduct relates to activity in the House which fall within the concept of ‘proceedings in Parliament’ then the Bill of Rights would preclude it.

¹⁰⁰ Bradley, note 45, at 361-2.

¹⁰¹ Bribery Act 2010, s.2 (2)-(4).

Nevertheless, these comments are necessarily speculative, and it is remarkable that we find ourselves in a situation whereby the major piece of legislation which applies (for the first time unambiguously) to alleged corrupt acts by MPs cannot be said to clearly permit their prosecution without violating the Bill of Rights. The Public Bodies Corrupt Practices Act 1889 and the Prevention of Corruption Acts 1906 and 1916 having been repealed by the Bribery Act, we cannot even be sure if the offence next most likely to be used to guard against corruption, misconduct in a public office, applies to MPs and, even it does, its shortcomings are widely recognised. Given that a corrupt act in Parliament is as potentially relevant to individual freedom as is overreach of public power, distorting the relation between man and man in making it more or less possible for an individual to call upon public power in relations with the other, such questions are of central rather than peripheral importance: they are questions of freedom, and are to be treated as such. They may not possess the glamour of fundamental rights issues, but are for that very reason worthy of attention: that the bizarre lacuna identified above has been permitted to persist indicates that they will not attract sufficient attention in the natural course of political reform in order to be remedied. We have said that what renders unfree within the neo-republican tradition is not the fact of arbitrary interference, but the possibility of it. One is unfree if one's interests could be interfered with on such a basis, whether or not this interference takes place. Democratic mechanisms prevent arbitrariness, and their subversion potentially restores it. That the law relating to the corruption of legislators is so uncertain might, from this point of view, be considered to render unfree in that it implies the absence of clearly defined legal obstacles to the subversion of the democratic process via the legislator's pursuit of his or her self-interest and so the exposure of the citizen to the arbitrary deployment of public power against him or her. If it does not render unfree it is only due to the operation of non-legal mechanisms which also contribute to, without necessarily achieving in full, the task of ensuring that public power is not exercised in a manner designed to promote the self-interest of those exercising it. We turn to those now.

9.6 Parliamentary rules

Alongside the criminal law, Parliament sets its own standards, both for the prevention of bribery and to regulate the acceptance of (lawful) payments to its Members. We can call these conventions to indicate that they are enforced politically, rather than legally, even though

they, like many modern constitutional conventions, are in most cases the result of specific declarations and written rules rather than the organic, temporally established conventions which are a distinctive feature of the constitution. Infractions of the relevant rules are dealt with as contempt and may result in expulsion from the House. If the system works to augment or, where necessary, make good the failings identified in, the criminal law, all is not necessarily lost. A consideration of some of the cases is therefore both necessary and instructive.

In 1695, in response to him having accepted a payment of 1000 guineas from the City of London for the promotion of an Orphan's Bill,¹⁰² the Speaker of the Commons, Sir John Trevor, was expelled. The House resolved that "the offer of money or other advantage to any Member of Parliament for the promoting of any matter whatsoever, depending or to be transacted in Parliament, is a high crime and misdemeanour."¹⁰³ Also expelled was the chairman of the Committee set up to consider the Bill. The affair precipitated an enquiry into a slush fund which the East India Company used to make payments to those willing to help it retain its statutory monopoly.¹⁰⁴ The resolution put in place a sanction that was "as rarely and arbitrarily applied as were other standards concerning personal conduct."¹⁰⁵

The 1695 resolution remains in force and is quoted in the appendix of the Guide to the Rules relating to the Conduct of Members along with an 1858 resolution which covers the corollary of such an offer - the misconduct of the MP in acceptance in accepting it: "It is contrary to the usage and derogatory to the dignity of this House, that any of its Members should bring forward, promote or advocate, in this House, any proceeding or measure in which he may have acted or been concerned for or in consideration of any pecuniary fee or reward."¹⁰⁶ The fact that the resolution relating to misconduct of the Member as bribee postdates that which highlights the misdeed of the briber has a certain symbolic resonance and is in keeping with the impression given by a consideration of some of the 20th century cases on contempt. These relate principally to those attempting to influence Members, rather than the Members

¹⁰² For background, see Henry Horwitz, *Parliament, Policy, and Politics in the Reign of William III*, Manchester University Press (1977), at 148-9.

¹⁰³ House of Commons resolution of 2 May 1695.

¹⁰⁴ For background and consequences, see Alan Doig, *Corruption and Misconduct in Contemporary British Politics*, Penguin (1984), at 53-7.

¹⁰⁵ Doig, note 104, at 54.

¹⁰⁶ House of Commons resolution of 22 June 1858.

permitting themselves to be influenced, or at least giving that impression. In 1943, a letter sent to Tom Smith MP by the National Marketing Company with a cheque for £5 so as to permit him to attend that company's trial for the purchase of fuel economisers without a license and then, perhaps, to raise that matter in the House, was reported to the Committee of Privileges. The Committee's report concluded that the matter was not one of contempt, however ill-advised.¹⁰⁷ In 1945, a complaint was made to the Committee by George Reakes, Member for Wallasey about a letter he had received from a Donald Henderson, offering a cheque for 100 guineas to his constituency association if Reakes were to help resolve certain "farming difficulties" to his satisfaction. The Committee held the conduct objectionable but that it did not constitute contempt.¹⁰⁸

Periodic reviews into specific instances of misbehaviour by those inside of or outside Parliament were accompanied by broader inquiries, which time and again failed to bring about the broader change in attitudes and practices that the facts they uncovered suggested was required. In 1948 the Lynskey Tribunal had reported on the behaviour of Sidney Stanley, who had been providing hospitality to junior and senior government figures with the intention of corrupting them.¹⁰⁹ Lynskey has been described as the "reaffirmation of the integrity of the British Civil Service and of the political morality of the member of Parliament,"¹¹⁰ but, less positively, as having been "criticized for the lack of specific criminal charges, lack of appeal against its conclusions, the nature and relevance of the evidence, and the procedures used."¹¹¹ Following the report of the tribunal, a committee, proposed by Attlee, examined wider issues of corruption in connection with lobby. While acknowledging the possibility of corruption, the committee was able to offer as a solution "only vigilance and good sense."¹¹² One need not be a particularly pessimistic observer of human psychology to believe that vigilance and good sense are likely to prove insufficient in this regard. To rely upon them in the place of actual mechanisms for the prevention of corruption is to demonstrate a reckless indifference to the freedom of the citizenry.

¹⁰⁷ (1942-43, HC 103)

¹⁰⁸ (1944-45, HC 63)

¹⁰⁹ *Report Of The Tribunal Appointed To Inquire Into Allegations Reflecting On The Official Conduct Of Ministers Of The Crown And Other Public Servants* (Cm 7616, 1948). For an overview of the facts, see Doig, note 104, at 117-20.

¹¹⁰ M.R. Robinton, *The British Method of Dealing with Political Corruption*, in A.J. Heidenheimer (ed.), *Political Corruption*, Holt, Reinhart and Winston, (1970), at 258.

¹¹¹ Doig, note 104, at 120.

¹¹² Doig, note 104, at 120.

Again in 1974, a Royal Commission on Standards in Public Life, chaired by Lord Salmon¹¹³ was convened, in partial response to the Poulson affair,¹¹⁴ which “became synonymous with entrenched and extensive networks of local government corruption and influence-peddling although it also encompassed Parliament and several public sector organizations.”¹¹⁵ It had already provoked an inquiry focusing upon these issues in the context of local government (the Redcliffe-Maud inquiry)¹¹⁶ and two Parliamentary inquiries. Between them, the Salmon and Redcliffe-Maud inquiries produced “a long list of eminently sensible, if mundane, recommendations,” of which few were implemented, and even those which were implemented “were not implemented systematically, or monitored later for effectiveness or review.”¹¹⁷ In fact, they were not even debated in the House of Commons, much as Lynskey had not been debated at all.¹¹⁸ The picture which emerges is of political system whose failings were brought to its attention with sufficient frequency that a failure to put them right was negligent rather than careless. Though none of the modern examples are particularly egregious, this seems to result as much from chance as from anything else. It was certainly not the result of a culture firmly committed to ensuring the purity of the democratic process; in neo-republican terms, to ensuring the non-arbitrary exercise of public power to the end of ensuring freedom. A political culture reckless as to the possibility of corruption leaves citizens vertically unfree by definition and potentially horizontally unfree by virtue of its outputs; the pursuit of the non-domination ideal reconnects us to the old republican concern for virtue and its antithesis, corruption.

9.7 The need for a register of interests

An on-going difficulty in identifying the operation of an improper influence in the conduct of politics was the absence of transparency as to extra-parliamentary sources of income. The arrival of a well-developed system of disclosure of financial interests was a long time coming, hampered by the drawing of unsustainable distinctions between what was and was not relevant to the integrity of parliamentary processes. In 1947, the Committee of Privileges

¹¹³ Report of the Royal Commission on Standards in Public Life, (Cm 6524, 1976)

¹¹⁴ The fullest treatment of the Poulson affair is Martin Tomkinson and Michael Gillard, *Nothing to Declare: The Political Corruptions of John Poulson*, John Calder Publishers (1980).

¹¹⁵ Alan Doig, *From Lynskey to Nolan: The Corruption of British Politics and Public Service?*, (1996) 23 *Journal of Law and Society* 36, at 42.

¹¹⁶ Report of the Prime Minister's Committee on Local Government Rules of Conduct, (Cmnd 5636, 1974).

¹¹⁷ Doig, note 48, at 180-1.

¹¹⁸ Doig, note 115, at 42 and 44. The Salmon report was debated in the Lords.

issued a report into the case of W.J. Brown, MP for Rugby and Parliamentary General Secretary of the Civil Service Clerical Association, a trade union.¹¹⁹ Brown's written contract with the Association permitted him to terminate the contract with 6 months' notice, but there was no parallel provision for the union. When it desired to do so, therefore, the Association was required to enter into negotiations with Brown as to suitable terms, an action which was reported to the Committee of Privileges as indicating an improper attempt to influence Brown in the exercise of his duties. The Committee split on Party lines - the Labour Members voting as a majority that the agreement had not fettered Brown's complete freedom of action, and a draft report, supported by the non-Labour members, concluding that improper pressure had been brought to bear. The Committee's report declared that "an outside body is... not entitled... to seek to control the conduct of a Member or to punish him for what he has done as a Member."¹²⁰ On debate in Parliament, the motion introduced by the Chair again saw a split on Party lines, the House resolving that:

"it is inconsistent with the dignity of the House, with the duty of a Member to his constituents, and with the maintenance of the privilege of freedom of speech, for any Member of this House to enter into any contractual agreement with an outside body, controlling or limiting the Member's complete independence and freedom of action in Parliament or stipulating that he shall act in any way as the representative of such outside body in regard to any matters to be transacted in Parliament."¹²¹

The principle is a sound one, but its terms leave little room for an explanation as to why else one might wish to offer money and, indeed, why an MP might be willing to accept it: if there can be no contractual limitation on the Member's freedom of action, nor can the Member act as a representative of an outside body, the only space left is one based on nods and winks, benefiting from the plausible deniability which exists in the absence of a binding agreement. Attempts in 1975 by the Yorkshire area Council of the National Union of Miners to determine how MPs which it sponsored should vote on certain issues by threatening to withdraw its sponsorship should they vote against its interests were held to constitute "a

¹¹⁹ The facts are described in Owen Hood Philips, *Parliamentary Privilege: The Case of Mr. W. J. Brown*, (1947) 10 *Modern Law Review* 420 .

¹²⁰ Report of the Committee of Privileges (1946-47, HC 118).

¹²¹ Committee of Privileges, note 120, at [11] - [15].

serious contempt, which represented a continuing threat to Members' freedom of speech and action."¹²² This is part of a pattern whereby rules on contempt were applied to trade unions with what seems to be, at least in retrospect, more vigour when compared to their application to more general business interests. Members whose freedom of action was left intact - those, perhaps, who accepted money offered with the aim of achieving an objective which they were already minded to promote, but now did so with greater zeal - were unaffected by this stance. It was at best, therefore, only a partial solution to the problem of insufficient safeguards against corruption.

The rules were evolving, but this regime left major gaps into which money could flow. In 1961, an article by the serving MP Francis Noel-Baker in Parliamentary Affairs had drawn attention to what he described as a 'grey zone' which had developed in the regulation of MPs' affairs.¹²³ Though MPs were being paid (as they have been since 1911)¹²⁴ Noel-Baker opined that the failure of Parliament to provide the facilities necessary to fulfil their presumed role left MPs with an unfortunate choice - "they must either do all their routine work themselves, with extreme inefficiency; or they must earn money from outside Parliament to pay for the facilities they need."¹²⁵ In these circumstances, the offer of outside sources of income were becoming more and more attractive - "particularly if they involve fees, retainers or expenses without an obligation to keep 'office hours' and demand no special qualifications. Even more attractive to some Members is a private appointment (as 'advisor' or 'consultant') that need not become generally known."¹²⁶ The result was a new form of largely invisible (and unprovable) political corruption which existing rules on declaration could not prevent, not applying to questions in Parliament, or MPs' correspondence and - worst of all where MPs were PR men with a single business relationship through which they provided services to a range of clients - not obliging the disclosure of a relationship between one's employer and a specific client with an interest in the matter at hand.¹²⁷ Among his proposals for reform, Noel-Baker numbered improved salaries and facilities for MPs, but also

¹²² Report of the Privileges Committee (1974-75, HC 634), at iv. For further detail, see David Judge, *Representation: Theory and Practice in Britain*, Routledge (1998), 113-4.

¹²³ Francis Noel-Baker, 'The Grey Zone': *The Problem of Business Affiliations of Members of Parliament*, (1958) 15 Parliamentary Affairs 87.

¹²⁴ For details of the history of Members' salaries and allowances, see Richard Kelly, *Members' pay and allowances - a brief history*, House of Commons Library (SN/PC/05075).

¹²⁵ Noel-Baker, note 123, at 90.

¹²⁶ Noel-Baker, note 123, at 91.

¹²⁷ Noel-Baker, note 123, at 92.

the introduction of a register “whereby each Member would be required to make regular, public returns of all fees received for services to business or other interests.”¹²⁸ The solution, was not to close the gap between the unfettered discretion appropriate to a democratic representative and the sorts of contractual obligations which were beyond the pale even for the parliamentary authorities, but merely to make its contents visible. This preference for transparency over prohibition has, we shall see, been the animating principle of the majority of modern reforms designed to address the problem Noel-Baker identified. It is not clear, however, that it meets the criteria we have previously; that it is sufficient to exclude the arbitrary exercise of power which would undermine the role of democracy in ensuring that public power does not render unfree.

9.7.1 The introduction of the Register

When change came, then, it took the form of the introduction of such a register. In 1969 a Select Committee on Members' Interests (Declaration), the Strauss Committee, had been convened and rejected the idea.¹²⁹ It did, however, suggest that the existing conventions as to the declaration of interests during debates in the House be put into a resolution of the House so as to make them mandatory. Its conclusions were never debated. Eventually, a 1974 resolution required that “in any debate or proceeding of the House or its committees or transactions or communications which a Member may have with other Members or with Ministers or servants of the Crown, he shall disclose any relevant pecuniary interest or benefit of whatever nature, whether direct or indirect, that he may have had, may have or may be expecting to have.”¹³⁰ A register was set up and first published in 1975. A Select Committee on Members' Interests was appointed - between 1976 and 1989 it received only three complaints.¹³¹ For four years, however, from 1976-80, the Committee declined to publish the Register as a response to the House's unwillingness to punish a group of MPs, led by Enoch Powell, who refused to make the necessary disclosures.¹³² A scheme which on its face represented a cleaning up of Francis-Baker's ‘grey zone’ was therefore hampered by the

¹²⁸ Noel-Baker, note 123, at 93.

¹²⁹ Report of the Select Committee on Members' Interests (Declaration), (1969-70, HC 57).

¹³⁰ House of Commons resolution of 22 May 1974 .

¹³¹ See Michael Ryle, *Disclosure of Financial Interests by M.P.s: The John Browne Affair*, [1990] Public Law 313, at 315. The third of these, which Ryle describes as “much the most important”, was a complaint regarding the actions of Conservative MP John Brown. Following a critical report Committee Brown apologised to the House for his actions. A split House voted to suspend him for 20 days and he did not seek re-election (at 315-7).

¹³² Doig, note 104, at 218.

unwillingness of the House as a whole to enter into the spirit of the endeavour. Those who were in a position to actively exclude the possibility of corruption and consequent arbitrariness - via legislative endeavour or Parliamentary self-regulation - were not minded to do so.

9.7.2 Nolan

In October 1994 the Prime Minister, John Major, announced the setting up of the Committee on Standards in Public Life (headed by a Law Lord of the day, Lord Nolan, and so known as the Nolan Committee), with a remit of examining “current concerns about standards of conduct of all holders of public office.”¹³³ The background to this included allegations made against Conservative MPs by Mohamed Al-Fayed and the ‘cash for questions’ affair regarding the willingness of (different) MPs to table Parliamentary questions for payment.¹³⁴ Alongside this, the Select Committee of Members’ Interests had produced a series of reports in the early 1990s in response to cases which had demonstrated a widespread “ignorance of or indifference to the spirit as well as the letter of the rules relating to financial interests,¹³⁵ making a mockery of any attempt to regulate in this area which was predicated upon the good faith of those being regulated.

The First Report of the Nolan Committee¹³⁶ identified seven ‘principles of public life’ (the ‘Nolan principles’): selflessness, integrity, objectivity, accountability, openness, honesty and leadership. The Committee noted that at that time the 1947 resolution, enacted in response to the Brown affair, remained the principal rule on the topic and yet contained “within itself the seeds of the current problem.”¹³⁷ Nothing in it acted to prohibit parliamentary consultancies, where an MP, for pay, put him or herself under an obligation to advise a client on Parliamentary matters. In seeking to exclude only restrictions on Members’ freedom of action it had left the Members the unfortunate freedom to “place themselves in situations where they

¹³³ HC Deb 25 October 1994, vol 248, col 758.

¹³⁴ The former were Neil Hamilton and Tim Smith; the latter Graham Reddick and David Tredinnick. For an overview of the circumstances leading up to Nolan and its immediate aftermath, see Oliver, note 31.

¹³⁵ Doig, note 115, at 49.

¹³⁶ Committee on Standards in Public Life, *Standards in Public Life (Volume 1: Report)* (the Nolan report), (Cm 2850-I, 1995).

¹³⁷ Nolan, note 136, at [2.29].

are liable to be improperly influenced.”¹³⁸ The clear subtext of the report was that, in focusing on the attempts of bodies outside parliament to improperly influence MPs, the authorities had overlooked the extent to which many MPs were content to be improperly influenced: their freedom of action not restrained by the arrangement, but with the outside interest nevertheless getting what it desired. The failures of a policy which relies upon assumptions as to when and where corruption would take place were once again laid bare. The solution, as should have by now been evident, was to exclude as far as possible the possibility of undue influence, regardless of intuitions as to its likely extent.

Two changes since 1947 were identified as particular salient to the failure of the existing arrangements to command confidence. Firstly, where previously outside employment had normally meant an MP carrying on the profession in which he or she was employed before election, it now mostly indicated employment arising out of his or her status as an MP: it was work they did *because* they were MPs, not despite it.¹³⁹ Secondly, the existence of the Register of Members' Interests had had unintended consequences - in particular, it “tended to create a false impression that any interest is acceptable once it is registered.”¹⁴⁰ Transparency had hidden the problem in the open rather than resolving it, in keeping with the studied complacency of the House itself.

The Committee made 11 specific recommendations relating to Members of Parliament. Amongst them was the recommendation that MPs not be barred from outside employment, on the basis that “the House of Commons would be less effective if all MPs were full-time professional politicians,” but that the 1947 resolution, banning any relationship restricting the freedom of MPs to act as they wished, should be restated.¹⁴¹ MPs should be barred from working for organisations which provided paid Parliamentary services for multiple clients, and direct employment for Parliamentary services should be disclosed and reviewed by the House; a Code of Conduct should be published; a Parliamentary Commissioner for Standards should be appointed. A ban on all forms of advocacy was rejected for the short term disruption it would cause and for the shortfall it would leave in the income of many MPs, who had “arrangements which have been made perfectly lawfully and are often of very long

¹³⁸ Nolan, note 136, at [2.35].

¹³⁹ Nolan, note 136, at [2.39].

¹⁴⁰ Nolan, note 136, at [2.40].

¹⁴¹ Nolan, note 136, at [2.59].

standing.”¹⁴² This last point demonstrates a certain confusion: the very reason for Parliament imposing rules of its own was that the law did not - indeed, *could* not and *should* not - regulate these matters, and so the fact that they were lawful was wholly irrelevant to the question at hand. General consultancies were regarded with significantly greater suspicion, for the Committee could see “no justification for consultancy agreements between Members and public relations or lobbying firms, which are themselves acting as advisers and advocates for a constantly changing range of miscellaneous and often undisclosed interests.”¹⁴³ It recommended that such arrangements be banned, and a prohibition introduced on “maintaining direct or active connections with firms... which provide paid Parliamentary services to multiple clients.”¹⁴⁴ On the basis of the considerations it cited, it is not at all clear that the Committee successfully justified its decision to distinguish between the different sorts of business relationships. From the perspective of the present work, the distinction is an illusory one, for the potential of self-interest to distort the exercise of public power is in each case the same. To prohibit one and rely on disclosure to mitigate the effect of the other demonstrates confusion as to where the harm lies in this sort of corruption.

In response to the Nolan report, the 1947 resolution was restated, in an amended form which made clear the ban on direct paid advocacy.¹⁴⁵ Where Nolan had recommended that disclosure of remuneration under registered contracts for parliamentary services not be required, the House in fact made it so.¹⁴⁶ A Code of Conduct was published by the new Committee on Standards and Privileges, which assumed the responsibilities of the Privileges Committee and the Select Committee on Members’ Interests, along with guidance to the Code. A new post of Parliamentary Commissioner for Standards was established. The Nolan report therefore precipitated an improved institutional apparatus aimed at discouraging the sort of external influences calculated to distort the democratic process, without yet ‘excluding’ them entirely by ensuring that any elected representative complicit in such distortions necessarily violates a legal or Parliamentary rule. By the terms of the account provided above regarding the need to ensure the non-arbitrary exercise of power by reason of

¹⁴² Nolan, note 136, at [2.52].

¹⁴³ Nolan, note 136, at [2.55].

¹⁴⁴ Nolan, note 136, at [2.55].

¹⁴⁵ Dawn Oliver and Gavin Drewry (eds.), *The Law and Parliament*, Butterworths (1998), at 109.

¹⁴⁶ Oliver and Drewry, note 145, at 109-10.

the unfreedom which results where it is not so excluded, it will be seen that these changes were insufficient.

9.8 The status quo

At present, the Code of Conduct for Members of Parliament¹⁴⁷ contains rules on the conduct expected of Members of Parliament and lists among the standards which Members are expected to maintain 'integrity', glossed as meaning that those in public office “should not place themselves under any financial or other obligation to outside individuals or organisations that might influence them in the performance of their official duties.”¹⁴⁸ In keeping with the trends described above, whereby generalised prohibition is resisted, the Code of Conduct attempts to maintain the integrity of the legislative and other Parliamentary process through the dual mechanisms of prohibition (of certain practices) and transparency.

The relevant rules of conduct include that no member may act as a “paid advocate” during proceedings,¹⁴⁹ and “the acceptance by a Member of a bribe to influence his or her conduct as a Member, including any fee, compensation or reward in connection with the promotion of, or opposition to, any Bill, Motion, or other matter submitted, or intended to be submitted to the House, or to any Committee of the House.”¹⁵⁰ The 1947 resolution, aimed at prohibiting arrangements which restrict members’ freedom of action, remains in force, having been updated in 1995 and again in 2002. It now further provides that “no Members of the House shall, in consideration of any remuneration, fee, payment, or reward or benefit in kind, direct or indirect, which the Member or any member of his or her family has received is receiving or expects to receive” either (a) “Advocate or initiate any cause or matter on behalf of any outside body or individual,” or (b) “urge any other Member of either House of Parliament, including Ministers, to do so”, by “means of any speech, Question, Motion, introduction of a Bill or Amendment to a Motion or a Bill or any approach, whether oral or in writing, to

¹⁴⁷ The Code of Conduct together with The Guide to the Rules Relating to the Conduct of Members (2011-12, HC 1885).

¹⁴⁸ *ibid*, at 4.

¹⁴⁹ Resolutions of 6 November 1995 and 15 July 1947 as amended on 6 November 1995 and 14 May 2002; Code of Conduct, note 147, at 5.

¹⁵⁰ Resolutions of 2 May 1695, 22 June 1858, and 15 July 1947 as amended on 6 November 1995 and 14 May 2002; Code of Conduct, note 147, at 5.

Ministers or servants of the Crown.”¹⁵¹ Direct paid advocacy is therefore both contempt of the House as well as, probably, an offense under the Bribery Act 2010.

In relation to that which a conscious decision has been taken not to prohibit, transparency is promoted by two “distinct but overlapping and interdependent” mechanisms for the disclosure of personal financial interests. The first is the longstanding requirement that in any “debate or proceeding of the House or its Committees,” Members “shall disclose any relevant pecuniary interest or benefit of whatever nature, whether direct or indirect, that he may have had, may have or may be expecting to have.”¹⁵² The second is the Register of Members’ Financial Interests. Each is justified on the basis of its contribution to the same ongoing project of securing honesty through transparency, albeit not in those terms: the Code of Conduct states that the RFI’s purpose is “to give public notification on a continuous basis of those financial interests held by Members which might be thought to influence their parliamentary conduct or actions”; that of verbal declaration “to ensure that Members of the House and the public are made aware, at the appropriate time when a Member is making a speech in the House or in Committee or participating in any other proceedings of the House, of any past, present or expected future financial interest, direct or indirect, which might reasonably be thought by others to be relevant to those proceedings.”¹⁵³ Inherent within the system, therefore, is a deeply entrenched belief as to the sufficiency of transparency.

9.8.1 Enforcement

The Code of Conduct is upheld by the House of Commons - like similar documents such as the Ministerial Code, it is not a legal document and so not enforceable by the Courts - through the dual authorities of the Committee on Standards and Privileges and the Parliamentary Commissioner for Standards. Reports by the Parliamentary Commissioner for Standards are considered by the Standards and Privileges Committee. The Committee reports its conclusions to the House, which may sanction as necessary, leaving the disciplinary process at the mercy of the significant polarisation along party lines which normally dominates proceedings in the House. In the current Parliament, notable reports include that

¹⁵¹ Resolution of 15 July 1947, amended on 6 November 1995 and 14 May 2002; Code of Conduct, note 147, at 34.

¹⁵² Resolutions of 22 May 1974, amended on 9 February 2009; Code of Conduct, note 133, at 43.

¹⁵³ Code of Conduct, note 147, at 10.

into the conduct of David Laws¹⁵⁴ and Denis MacShane.¹⁵⁵ Most of the Committee's work, however, is concerned with conduct which benefits the Member personally rather than where the breach has or threatens to distort the democratic process. Outside of these cases, the problem is not that Members accept money from third-parties, but their failure to declare an interest.¹⁵⁶ The main exception is the report into the conduct of Sir John Butterfill, Stephen Byers, Patricia Hewitt, Geoff Hoon, Richard Caborn and Adam Ingram, some of whom had demonstrated a willingness to make introductions to Ministers in return for payment, and others of whom had boasted of having done so in the past.¹⁵⁷ Their misdeeds, however, came to light only because the company offering payment (in the form of a directorship or consultancy work) was in fact a front for an undercover reporter working for the Sunday Times and the Dispatches television programme. That Members were willing to involve themselves suggests at least a minimal level of corruptibility that is difficult to reconcile with the notion that declaring interests is a suitable protection against actual corruption. Similarly, the fact that the potentially 'corrupt' act was not part of the formal duties of the Members in question but something which would take place out of the public eye, without leaving any trace on the public record, calls into question the ability of transparency to do the work asked of it. Here as elsewhere, however, the rules and processes by which standards are upheld make little room for substantive scrutiny of the interests Members have, thereby potentially permitting the use of financial resources to distort the exercise of public power.

9.8.2 Disclosure of interests

The rule as to declaration of interests is broader than the rules relating to their registration applying not just to present interests, but to those which existed in the (recent) past and expected future interests.¹⁵⁸ The rule applies also to indirect interests, such as those of a spouse, where relevant. An interest should be declared if "it might reasonably be thought by others to influence the speech, representation or communication in question."¹⁵⁹ The duty to

¹⁵⁴ Committee on Standards and Privileges, Fifteenth Report of Session 2010-12, (2010-12, HC 1023-I).

¹⁵⁵ Committee on Standards and Privileges, Second Report of Session 2012-13, (2012-13, HC 635).

¹⁵⁶ E.g., Committee on Standards and Privileges, Twelfth Report of Session 2010-11, (2010-12, HC 840), relating to a failure to declare, during a debate on the second reading of Fire Safety (Protection of Tenants) Bill, that her husband was member of the board of the Fire Protection Association and Chair of its Advisory Council. The Committee found the Member to be in breach of the House's rules.

¹⁵⁷ Committee on Standards and Privileges, Ninth Report of Session 2010-11, (2010-11, HC 654-I).

¹⁵⁸ Code of Conduct, note 147, at 28-29.

¹⁵⁹ Code of Conduct, note 147, at 29.

disclose applies to the tabling of written notices (e.g., questions, motions, amendments), and with greater scope in relation to the work of Select Committees, where Members will normally be expected to stand aside from its work if they have a direct financial interest, and to Private Members Bills, which under Standing Order 120 require a declaration to the effect that that the Member has no personal interest nor, strangely, do his or her constituents have any local interest in the matter with which the Bill deals. Only in very limited circumstances, such as the asking of a supplementary question where to do so would be impracticable, is disclosure not mandatory.¹⁶⁰

9.8.3 The Register of Members' Interests

Where there is no opportunity to verbally inform the House of the interest in question, the general need for Members to disclose in relation to, for example, votes in divisions, is dealt with on an ongoing basis by the existence of the Register of Members' Financial Interests. A newly elected MP is required to provide the information required by the Register within one month of election; changes are to be notified to the Commissioner within 4 weeks. At present, the Register of Members' Financial Interests (until 2008 the Register of Members' Interests) holds information on the financial interest of MPs under 11 separate headings: (1) directorships; (2) remunerated employment; (3) clients; (4) sponsorships; (5) gifts; (6) benefits and hospitality; (7) overseas visits; (8) overseas benefits and gifts; (9) land or property; (10) shareholdings; and (11) controlled transactions under Schedule 7A of the Political Parties, Elections and Representation Act 2011. Pursuant to a Resolution of the House of Commons of 27 March 2008, a separate Part 2 of the Register contains a 12th category - the names and job titles of any family members employed and remunerated through Parliamentary allowances.¹⁶¹ Threshold limits apply to all but the first three categories, below which disclosure is not required. The fourth, tenth and twelfth categories requires "the registration of all benefits received from the same source which amount to more than £1,500 in a calendar year, in increments of more than £500."¹⁶² The fifth, sixth and seventh categories require declaration "of all benefits, received from the same source in the course of a calendar year, which cumulatively amount to more than 1 per cent of the current

¹⁶⁰ Code of Conduct, note 147, at 33.

¹⁶¹ An addition made following the Derek Conway affair.

¹⁶² Code of Conduct, note 147, at 12.

parliamentary salary.”¹⁶³ Property must be disclosed if its value is greater than the annual Parliamentary salary; rental income if its value is more than ten per cent of that figure. Shareholdings are to be disclosed only if their value is greater than the annual Parliamentary salary or of 15% of the issued share capital. The specificity of the RFI is to be welcomed, though in providing certainty it lacks the catch-all nature of the verbal disclosure requirement. It also lacks any method of matching up specific actions - a vote on this bill, or that amendment, say - with particular interests which have been declared. To cross check this manually is of course impossible and so unless a particular MP or issue becomes the subject of journalistic interest, the fact that there is a conflict of interests is not particularly likely to come to public attention. Most problematic, however, is the assimilation within the RFI of a series of qualitatively different interests - some which all or almost all Members will have and are unlikely to ground a meaningful distortion of the democratic process (e.g. the ownership of property) and others (such as directorships or remunerated employments) of which we should be far more vigilant.

The range of activities prohibited by the House is not significantly wider than it was 50 years ago. Instead, there is an expanded duty to disclose external interests and a more sophisticated mechanism for doing so. This assumes, of course, that inclusion on the RFI is sufficient to bring the fact to the attention of the relevant parties and that Members will not be sufficiently brazen as to act in a way which promotes their personal financial interests with no concern for who knows it. It is not clear that the need to disclose interests disincentivises inappropriate conduct to the extent that we can be certain of the non-arbitrary exercise of public power. Disclosure will not necessarily make clear *why* the intervention in question might be thought to have been influenced. Taken literally, an interest which *has* influenced an intervention but for reasons not obvious to a hypothetical reasonable observer would not have to be disclosed. The neo-republican imperative against the corruption of the political process goes unfulfilled.

9.8.4 Rules for Ministers

The Ministerial Code contains additional rules for those who hold ministerial posts: they are required to “scrupulously avoid” any conflict of interest - real or perceived - between their

¹⁶³ Code of Conduct, note 147, at 12.

own financial interest and their Ministerial duties. The general principle governing such conflicts is that “they should either dispose of the interest giving rise to the conflict or take alternative steps to prevent it.”¹⁶⁴ Specific mention is made of the requirement that decisions not be taken with a view to potential future employment by an outside body.¹⁶⁵ Gifts to ministers in their ministerial capacity become property of the Government, though those of small value may be retained.¹⁶⁶ Hospitality accepted in their ministerial capacity are to be notified to the department’s Permanent secretary; the department will publish details of the hospitality quarterly.¹⁶⁷

Ministers who leave office are forbidden from lobbying government for a period of two years afterwards. Other appointments or employment which they wish to take up within that period are, under the Ministerial Code, subject to the advice of the independent Advisory Committee on Business Appointments (ACOBA). Its rules have the stated aim of seeking to counter suspicion that “the decisions and statements of a serving Minister might be influenced by the hope or expectation of future employment with a particular firm or organisation.”¹⁶⁸ To that end, the Committee applies the following test: “to what extent, if at all, has the former Minister been in a position which could lay him or her open to the suggestion that the appointment was in some way a reward for past favours?”¹⁶⁹ Members of the Committee are appointed by the Prime Minister in line with the Commissioner for Public Appointments’ Code, except for those who are nominated by the leaders of the main political parties. The rules themselves are determined by the Cabinet Office with the approval of the Prime Minister.

In the period from 1 April 2010 to 31 March 2011, the Committee advised 42 former Ministers on 95 appointments, of which 85 were eventually taken up.¹⁷⁰ A higher than usual figure reflected the change of government in the relevant period.¹⁷¹ 21 of the appointments were approved unconditionally; 65 with conditions attached; and 9 with a mix of conditions

¹⁶⁴ Cabinet Office, Ministerial Code, (May 2010), at [7.7].

¹⁶⁵ Ministerial Code, note 165, at [7.7].

¹⁶⁶ Ministerial Code, note 165, at [7.22].

¹⁶⁷ Ministerial Code, note 165, at [7.24].

¹⁶⁸ Advisory Committee on Business Appointments, Business Appointment Rules for former Ministers, (May 2010), at [1.a].

¹⁶⁹ ACOBA, note 169, at [3.i].

¹⁷⁰ ACOBA, Twelfth Annual Report (2010-11), at [61].

¹⁷¹ ACOBA, note 171, at [62].

and a waiting period attached.¹⁷² It is deeply unfortunate that it is only where the appointment is taken up that the advice is published, and the public permitted to know of the making of the offer of employment, and what concerns the Committee had (or may have had) with regards to it: this is transparency as curate's egg, with the exception acting to undermine, quite significantly, the rule. The Committee's willingness to delay publication for spurious reasons is also troubling and out of keeping with the purpose of the scheme.¹⁷³ Even when publication is carried out, the scheme falls short of providing the information required for transparency to function: to take an example, the private consultancy work of Tony Blair, through his firm Tony Blair Associates, has been of considerable interest since he set it up. The Committee's annual report in 2008-9 merely describes the firm as providing "strategic advice on both a commercial and pro-bono basis, on political and economic trends and governmental reform" and states that it saw "no reason why he should not set up the firm forthwith."¹⁷⁴ Though most of its activities have taken place well outside of the 2 year period (it was set up in January 2009, Blair having left office in June 2007), the success of the firm has contributed heavily to the process whereby Blair has accumulated massive private wealth.¹⁷⁵ It goes without saying that Blair would not have managed this but for the position he had previously held. That alone does not demonstrate a corruption of the democratic process, nor does it mean that Blair should have been obstructed from accepting these contracts. It does, however, indicate the same sort of complacency that we encountered in the context of issues of bribery and parliamentary privilege. Despite popular opinion on this topic, those who make the rules seem surprisingly unconcerned the integrity of the democratic process - as though the largely homogenous political class could by virtue of its shared British values and common educational experiences be trusted to use its power for the public rather than private good, even as it is shown to have frequently and egregiously abused it for personal gain.

The system does not apply solely to former Ministers - it also applies, with appropriate variations, to civil servants, diplomats, special advisors and members of the armed forces.

¹⁷² ACOBA, note 171, at 15, table 1.

¹⁷³ See, e.g., its 2009-10 report, which contains entries relating to the activities of Tony Blair - one appointment as a Governance Advisor to the Kuwaiti Government in 2007, publication of which was delayed "at the request of the Kuwaiti government", and another relating to advice given by Blair in 2007 to a "consortium of investors led by the UI Energy Corporation" which was delayed "due to market sensitivities." ACOBA, Eleventh Report (2009-10), at 15.

¹⁷⁴ ACOBA, Tenth Report (2008-9), at 15.

¹⁷⁵ A report in the Telegraph (13 Jan, 2013) suggests that Blair's personal wealth is "somewhere between £35 million and £60 million."

Notable in this regard was its decision by ACOBA to clear the appointment of Sir Sherard Cowper-Coles, former Ambassador to Saudi Arabia, to take up the post of international business development director for BAE.¹⁷⁶ The intervention of Sir Sherard had previously been central to the decision of the Director of the Serious Fraud Office to discontinue a criminal investigation into BAE.¹⁷⁷ The Committee was untroubled by this fact. It emphasised that four years had passed since Sir Sherard had had contact with BAE in his role as Ambassador to Saudi Arabia in clearing him to take up the post, subject to the proviso that he must not “become personally involved in lobbying UK government ministers or crown servants, including special advisers, on behalf of his new employer.”¹⁷⁸ Speaking hypothetically, if this offer of employment were some sort of reward for the former ambassador’s intervention in the work of the Serious Fraud Office, then the affair would seem to demonstrate that a two year time limit is highly unlikely to catch all potential misdeeds in this regard: if a Minister or other individual caught within the scheme provides a favour of sufficient magnitude then having to wait two years for the favour to be returned is not a significant disincentive. Indeed, if we are discussing those in Ministerial roles, it is entirely possible that at the point at which that period elapses the individual in question will remain an MP.

Similarly, the emphasis on ex-Ministers having to refrain from lobbying the government for a specified period misses the point that it is significantly easier for a private party to be provided with an advantage by a Minister who has a direct decision making power than indirectly, via that person’s lobbying potential when he or she is already out of office: the rules should be alert to the fact that a ban on lobbying may be no disincentive at all for by that point the damage (in the form of a decision made in contravention of standards of good faith, or without due regard to the public interest) may have already been done. No system will ever succeed in excluding any potential quid pro quo, but a more concerted attempt must be made. The two year waiting period is plainly insufficient. Again, this is not merely of high-minded interest. Political actors, ministers in particular, enjoy legal and legislative powers the exercise of which goes a long way to determining the horizontal freedom of private individuals. When the democratic process is distorted in favour of those with money

¹⁷⁶ The Guardian, *BAE Systems Hires Britain's Former Envoy to Saudi Arabia*, 19 February 2011.

¹⁷⁷ *R (Corner House Research) v Director of The Serious Fraud Office* [2008] UKHL 60, at [14] and [20] in particular.

¹⁷⁸ ACOBA, note 171, at 51.

to insert into it, it is these anonymous masses who suffer, and not some abstract notion of public morality.

9.9 Assessing the system

The overall system for preventing the distortion of the democratic process works, then, on the dual basis of banning direct quid pro quos for activity by MPs through the criminal law on one hand, and a series of non-legal disclosure requirements on the other, to which are added extra, more stringent, requirements for those holding ministerial office. Even on its own terms (the ends of which are not clearly articulated), there is no reason to believe that this combination will be successful. Working on the basis of the neo-republican non-domination ideal, there is reason to consider them inadequate. Taking the requirements of registration at face value, some anomalies are evident. Most remarkable is the threshold set for the disclosure of shareholdings - being pegged to MPs' salary, it stands currently at £65,739, unless it is greater than 15% of the total stock in the company. MPs are therefore under no obligation to declare on the Register any shareholding under that value, even though they are frequently called upon to vote on issues which can have a dramatic effect on their value. This is unacceptable, and cannot be justified by the difficulty of tracking the shareholdings of those involved.

But even beyond the question of the specific thresholds at which disclosure becomes mandatory, the idea of registration as a solution to the problem, or guarantee, against, corruption of the democratic process, seems unconvincing. Firstly, we must reject interpretations of the scheme which see it as having the effect of either rendering legitimate actions which would otherwise be held illegitimate - i.e., that a conflict of interests which is knowable to the public is somehow 'good' even if, if kept hidden, it would be considered 'bad' - or of ensuring that conflicts of interest will not in fact occur. Both are wrong. Conflicts of interest occur, and are no less harmful simply because the information is required to diagnose them is made public. By requiring disclosure for the sake of transparency, it is being suggested either that the MP in question is able to make a contribution which sees past the vested interest he or she has in the matter at hand or, alternatively, that those hearing the contribution should be in some sense 'on guard' as to the possibility that the contribution made is not entirely free of the influence of the Member's interest. Neither of these scenarios

convinces: though the information is available, it is unlikely that any but the most dogged observer is capable of matching up votes in Parliament with relevant declared interests.

This is the danger first identified by Nolan almost 20 years ago: a system of disclosure carries with it the danger of promoting a worldview in which nothing is improper so long as it is declared. It is exacerbated by a second factor: that the Register of Financial Interests makes no useful distinction between those interests which are of little or no significance to the functioning of democracy and those which threaten to subvert it, to see one set of private interests improperly promoted and the equilibrium of the of interests between one private actor and another readjusted.

Similarly, the Register functions on the basis of a presumption that any benefit received as part of a corrupt process is both tangible and sufficiently contemporaneous for the mandated transparency to prevent it. This is optimistic: the banning of direct quid pro quo does not of course have the effect of ruling out the possibility that a non-financial benefit will be offered, nor that an illicit favour will be returned in kind at some future point. Similarly, we have seen that the approval of the Advisory Committee on Business Appointments is required if former Ministers wish to accept employment within two years of leaving their posts. This period is simply too short to act as a useful deterrent to the offer of delayed reward for services rendered to private actors while in office. We have therefore put together an elaborate system for signposting and rubberstamping of potentially corrupting influences without doing anything significant to reduce them. One need not be as cynical about the moral status of Parliamentarians as is the public at large to fear that for a sufficiently shameless MP, the system provides no meaningful disincentive at all.

We have highlighted consistently the necessity of an institutional exclusion - based upon clear and enforceable rules - of the corruption of the democratic process. A system to which transparency is so central is necessarily relying upon other factors - the good faith of those regulated, perhaps, or a diligent media - is necessarily secondary to one in which the things that good faith or media scrutiny are supposed to prevent are prohibited. An elected representative is left the possibility of acting out of self-interest without contravening any rule whatsoever. This is impermissible in a system in which, we have said, the fact that the public power is exercised in such a way as to track the interests of those living under it is the

only thing which prevents that public power from being wholly illegitimate. Where, as here, lawful mechanisms exist which are capable of preventing that tracking from happening, the public is to that extent unfree for reason of being exposed to a public power which cannot be designated wholly non-arbitrary. And given that these mechanisms are driven primarily by property, that unfreedom is suffered by those without property (who lack the ability to distort the exercise of public power to their own advantage) in relation to those who possess it. This remains true regardless of the moral status of actors within the system.

9.10 Conclusion

It is central to our thesis, that democracy, rather than rights, is the domain of freedom. This applies firstly in relation to the use made of public power: democracy must function if the coercive apparatus of the state is not to be utilised in an arbitrary fashion to pursue the state's own interests - if the individual is to be vertically free. It also ensures, however, that public power is not put to work in the interest of one private actor against another on a basis that does not properly incorporate the interests of the latter. Democracy feeds into questions of private power (and so private freedom and unfreedom) in a manner which redoubles the importance of ensuring that it is not distorted. And yet, despite an almost never-ending series of developments of both the criminal law and the internal regulation of the House of Commons, the ability of money to influence a process already weighted in favour of those who own property remains intact, usually neglected in favour of a narrative of political greed which strengthens the hand of those who would see the state (with, of course, the exception of its property-protecting functions) dismantled so as to clear the way to private profit. That money both grounds horizontal unfreedom and potentially distorts the democratic process brings into focus the danger we must apprehend: that we enter into a feedback loop where the already wealthy, at whose mercy the have-nots live, inject their wealth into the democratic process in order to tilt the balance even further in their favour, and so, for example unravel the system of welfare protection which the masses, once integrated into the political process has succeeded in achieving. Such a state of affairs - essentially the opposite of the process whereby the masses used their new found political power to militate for legal and political reforms which freed them from the domination of those who had previously kept them excluded - is, it is submitted, already evident, and it is against this process that neo-republicanism should resolve itself.

Conclusion - Republican freedom and the legal division of labour

The neo-republican project has proven influential in the last decade. It has attracted a large number of adherents and given rise to a significant quantity of interesting scholarship, showing signs of an ability to take up some of the slack of communitarianism, feminism, and possibly even Marxism, while also entering into a productive dialect with these traditions and others. It has taken much of what was good in the numerous instantiations of republicanism and, by jettisoning that which is outdated or peripheral, introduced a momentum that has served it well. What it has not done, however, is interrogate fully the logic of horizontal domination. The present work has taken such domination as its focus. Starting from the premise that not only is the freedom as non-domination ideal a compelling one, but that the insistence upon horizontal and vertical freedom as deserving of equal concern sets neo-republicanism apart from the commonplace assumptions about the relationship between individuals and their relationships, jointly and individually, with the state, certain conclusions have been drawn. Rather than rehash these individually, it serves only to note that, cumulatively, they become a claim about the pervasiveness of unfreedom and freedom - in life and in law alike. Firstly, the ways in which people find themselves unfree are far more widespread than a crude interference analysis would suggest. Unfreedom exists wherever our fellow citizens or our governing authorities enjoy the ability to interfere arbitrarily with our interests. Secondly, the relationship between law and the absence of freedom comes to be seen as of considerably broader spread than the political orthodoxy would suggest. Freedom should not be seen as the default state of affairs, disrupted only in exceptional cases and requiring exceptional legal mechanisms for its vindication; instead, the law which threatens freedom is as likely to be that which places conditions upon the exercise of the right to strike or the conditions under which one can achieve a divorce and the financial settlement which will result from it. Indeed, such legal unfreedom is all the more pernicious for fading into the background and taking on the appearance of an apolitical artefact of the 'natural' distribution of legal entitlements in society.

Horizontal domination is a function of the coercive options open to each individual - the actions he or she can take or not take expecting to receive the backing of, or avoid the sanctions associated with, the apparatus of the state. These options are determined by the law: the ordinary private law of rights and obligations which are applied against a background

distribution of property which is in turn an artefact of law. Such rules do not arise in a vacuum, but are a function of a given constitutional order; the second-order rules by which the first-order rules are made. The republican constitution must be designed with this end in mind. Our considerations of rights and democracy, like those of horizontal unfreedom in spousal or employment contexts, exemplify modes of analysis that can be applied far more broadly.

The argument of this thesis speaks therefore to two key points. Firstly, to the attitude we take towards the state. It is a commonplace of constitutional law and theory that one's views are inextricably linked to the question of what one takes to be the appropriate role of the state. We can take this one logical step backwards and connect this to the question of why there is a state at all. Liberal thought traditionally identified it with the protection of property first and foremost; more modern liberalism with the protection of the 'right' which is opposed to the 'good'. The present work has argued that the *raison d'être* of the state is to exclude the horizontal domination which would exist in its absence, a purpose which must be borne mind at every stage. What matters is that where there is an organised public power, there must be rules which determine how and where that power will be exercised. In relation to material goods, that body of rules we call the law of property. Once private property is recognised, the game is changed. No longer can one meet one's human needs without either working for another or infringing the law and coming up against the coercive apparatus through which property is protected. The stage is set for those who have to dominate those who do not. Much of what we have suggested the republican state need do to spread horizontal freedom follows directly from the recognition of private property. With it, the die is cast.

Secondly, this thesis works to undermine the intellectual division of labour which exists within legal scholarship, justified upon the basis of the supposedly separate nature of the legal, the political and the constitutional. The points of contrast are multiple and telling. The dignity of the legal and the constitutional distinguishes that side of the triangle from the messy nature of the political. The strictly legal is mostly insulated against politics, which nevertheless permeate the constitution. The constitution has little to say about how men relate to each other, regulating instead their dealings with the state. And yet the argument put forward here tramples over these distinctions. It demonstrates that the ends of these different facets are interlinked and all are equally implicated in the pursuit of a freedom that is both

human and political. To attempt to restrict the pursuit of life's great ends to one or the other of these boxes is to do them a great disservice. They cannot, and will not, be achieved while this division of labour is blindly accepted as a starting point, so well coded into the discourse that to even see the links which exist between them requires one to step outside one's own box.. This thesis, if nothing else, exemplifies a perspective which is appreciative of their equal importance.

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